CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA

AT

MONROE.

JUNE, 1880.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice;*

HON. F. P. POCHÉ,
HON. R. B. TODD,
HON. WM. M. LEVY,
HON. C. E. FENNER,
} *Associate Justices.*

No. 969.

CLARA SILBERNAGEL, WIFE, vs. BENJ. SILBERNAGEL, HUSBAND.

Although an Intervenor cannot retard the trial of a case, yet he is entitled to the time necessary to have his Intervention served and put at issue, before the case can be tried.

APPEAL from the Sixth Judicial District Court, parish of Morehouse. *Brigham*, J.

David Todd for Plaintiff and Appellee.

Newton & Hall, Frank Vaughan, and G. H. Ellis for Intervenors and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit by a wife against her husband for the recognition of averred rights against him.

The petition and answer were filed on the same day, no citation

having previously issued to the defendant. The case was put on the docket in a condition to be called and tried the same day.

On ascertaining the existence of the suit, and previous to the case being called for trial, permission was asked by counsel for certain parties to file an intervention in their behalf, upon which the process of the Court was sought. The judge took the application under advisement and continued the case to the next court-day, a Sunday intervening.

On the day of assignment, the case was called for trial. The judge allowed the intervention to be filed. Whereupon, leave was asked to file another intervention on behalf of other parties, and the motion was granted.

The parties defendant in the interventions declining to acknowledge service and to proceed with the case, counsel for intervenors moved that the process of the Court issue to the proper parties and the case be continued until after issue joined on the interventions.

The Court denied the motion, on the ground that intervenors have no right to retard the progress of the cause in which they make appearance.

Had the suit been brought and carried on with the usual forms and delays, the ruling of the Court would have been correct; but, in a case like the present one, it would be requiring a physical impossibility to demand of an intervenor (whose proceeding is to be served, with the allowance of a delay of *ten* days to join issue,) that he be ready, before *two* days have elapsed since the institution of the suit, to proceed with his intervention, when the main suit is called for trial. The requirement of readiness cannot be exacted where the main case has not had a standing certainly exceeding *ten* days on the Court docket, within which parties may file their interventions, to have them served. *Lex neminem cogit ad impossibilia.*

The rapidity with which the plaintiff and defendant have put their issues of record and have proceeded to judgment, cannot be invoked as a standard of celerity for the dispatch of proceedings on the part of third persons, when the law prescribes that such proceedings shall be followed by certain process and delays.

Judicial investigations are not to be so quickly flashed through, and must be attended with more solemnity and dignity, for the protection of the rights of all parties concerned and a safer administration of justice.

The promptness of the plaintiff and defendant in this matter cannot serve to defeat the intervenors in the assertion and vindication of the rights which they claim, in a form of their preference, and expressly authorized by law, to avoid an unnecessary and onerous multiplicity of actions.

The intervenors cannot be driven to resort to a direct suit, for any

purpose, when the law has allowed them a different and more appropriate proceeding. To refuse them the process of the Court on their intervention, in such an instance as is presented, would amount to a denial of a right clearly accorded by law.

If the ruling complained of were sanctioned, a dangerous and illegal precedent would be established.

In a case not as strong as that before the Court an intervention filed on the day of trial was allowed to be served on opposite parties, and for this purpose the cause was continued to put the intervention at issue. 25 A. 564, Sandel vs. Douglas. See, also, 16 L. 265; 3 A. 331; 20 A. 258.

It is therefore ordered that the judgments of the lower court refusing the motion of the intervenors for process, the continuance of the case for that object, and passing on the main demand, be reversed, and that this case be remanded for further proceedings according to the views herein expressed and according to law, appellees to pay costs of appeal and of the lower court from the time of the filing of the interventions.

Mr. Justice TODD recuses himself, having been of counsel.

No. 981.

WM. M. GILLASPIE, ADMINISTRATOR, ET AL. VS. LEM. SCOTT, SHERIFF, ET AL.

Held that damages cannot be allowed in dissolving an injunction issued without bond under Art. 739, C. P. Re-affirming previous Decisions.

When this Court decides in one Appeal all the issues pending between the same parties in another Appeal, those issues are definitively disposed of, and the execution of the judgment appealed from cannot be retarded by the existence of the other Appeal, taken in same case and from the same judgment. The judgment of this Court, in such a case, is final.

APPEAL from the Fifth Judicial District Court, parish of Richland. *Richardson*, J.

Cobb & Gunby for Plaintiff and Appellee.

Stubbs & Stillman for Defendants and Appellants:

First—Injunctions without bond must be confined to the causes only set forth in C. P. 739.

Second—If any other cause is alleged, there must be bond and security, or the averments will be disregarded, or the injunction dissolved, at the option of Defendant.

Third—Reconventional demands are not permissible under Art. C. P. 739.

Fourth—Issues already adjudged between the parties should not be allowed to be plead under this article.

Fifth—When it is evident that the injunction under 739 is for no just cause, and for the simple purpose of harassing and hindering the enforcement of the mortgage, though no bond or security be required, the aggrieved party should have his damages.

Sixth—In an appeal perfected by one of the parties litigant the issues involved should be finally settled and a second appeal from the same judgment should not be permitted.

W. J. Baker et al. vs. Richardson, Monroe Opinion Book, p. 214.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff and appellee moves to dismiss this appeal on the grounds:

(a). That the certificate of the clerk is not at its proper place in the transcript and is not full;

(b). That the transcript is incorrect and incomplete;

(c). That matters and documents are incorporated in the transcript which do not belong to it;

(d). That a transcript belonging to this Court was, without leave, so incorporated.

(a). We find the clerk's certificate properly at foot of the transcript prepared by him in this case, and which covers seventy-five pages. Looking into the note of evidence, in the transcript, we discover an agreement to use, on appeal, the transcript of a record introduced in evidence, filed in this Court, and which is minutely described in the agreement. It was legitimate for the parties to so agree, to save time and useless costs. The certificate of the clerk refers to the agreement and to the transcript annexed to his own, and which in all other respects satisfies legal requirements.

(b). The transcript does not appear to be incorrect. If it is not *full*, in not containing a copy of the record offered in evidence, it is because the parties have agreed that it be not transcribed. The clerk has done as he was directed and authorized to do, and acted properly under the circumstances.

(c). We have been unable to discover any matter or documents as incorporated in the transcript which are foreign to it. The complaint in this respect also is not well founded.

(d). The transcript which was to be used, by consent, in this Court in case of appeal, is attached to the transcript of the case before us. It was withdrawn from the clerk's office of this Court apparently with-

out leave of Court, and annexed to the transcript of the present case. This withdrawal and use of a transcript, in a *decided* case, was unauthorized and is censurable. The Clerk of this Court should not have permitted it to go from his hands, and the clerk of the lower court should not have used it the way he did, in having both bound together. This irregularity cannot, however, affect the sufficiency of the transcript in the case before the Court, so as to justify the dismissal of the appeal. If it was wrong—as it really was, to withdraw and use, without permission, this transcript, as was done—the wrong is repaired by a return of it to the clerk's office. After the decision of this case, the clerk will separate the bound transcripts and place them in order in this office.

The motion to dismiss is overruled.

ON THE MERITS.

The plaintiff has obtained an injunction to arrest a writ of seizure and sale issued against him on executory proceedings instituted by the Citizens' Bank of Louisiana. He complains that the charter of that corporation was long since forfeited; that the contract averred by the bank was procured by fraud, error, and grave misrepresentations; that the loan of $28,000, alleged to have been made, never took place; that the loan was paid and returned to the lenders; that the bank is indebted to him in the sum of $21,000 for illegal occupancy and enjoyment of the land seized.

Dealing with the case as if covered by article 739, C. P., the plaintiff, verifying his averments by *affidavit*, asked and obtained the injunction *without giving bond.*

By her counsel, the bank filed exceptions to the right of action, accompanied by an answer. By a proceeding in the nature of a motion to fix, the case was assigned for trial. When it came up, the District Judge proceeded to determine the exceptions, and having done so, by sustaining them, he assigned the case to another day, to constrain plaintiff to prove his allegations. Under article 741, C. P., the trial of injunctions of this character is to be *summary*, 26 A. 651, 30 A. 1164, in order that the differences of the parties may be speedily adjusted and the process of the Court be not unnecessarily delayed.

After hearing, the Court dissolved the injunction, but without allowing any damages—reserving the rights, if any, of plaintiff to claim the $21,000 in another proceeding.

From the judgment, so rendered, both parties have appealed—the defendant by motion in open court previous to adjournment, appeal returnable to this Court on the first Monday of June, 1880; the plaintiff by petition after adjournment, appeal returnable to this Court on the first Monday of June, 1881.

The appeal of the defendant is now before us, but the transcript, consequent on plaintiff's appeal has not yet been filed.

The plaintiff, after moving for the dismissal of the appeal, and contingent on the overruling of the motion, *answers* and asks that, for reasons assigned, the judgment of the lower court be reversed.

We shall now proceed to review the differences between the parties litigant on the questions, both of practice and of law, and facts presented by the record.

On the 15th of August, 1879, having filed these exceptions, and that answer, the defendant obtained an order to compel the plaintiff to prove, on the 16th of September following, the truth of the facts alleged by him; but it is not until the 14th of May, 1880, that the case came up. The exceptions to the petition were sustained and the issue was restricted to the averment of *payment*, and the case was continued to the 25th of May to enable the plaintiff to prove the truth of his averments.

The lower court properly sustained the exceptions by its judgment of May 14.

On the exceptions the bank had charged—

That Mr. Simms, administrator, whose name had been used to obtain the injunction, never authorized any such proceeding on his behalf; that the demand of plaintiff for a money judgment is not permissible in a proceeding like this; that all issues raised by the petition in injunction, save that of payment, have been finally adjudicated upon in a case specially mentioned; that the plea of payment is inconsistent with every other material allegation in the petition, and should be disregarded. After setting up these preliminary defenses, the bank had asked that the plaintiff be held to prove his allegations. J. W. Simms made *affidavit* to show that his name had been used without his authority, and the suit was, as to him, dismissed, and this properly.

It is clear that where proceedings are instituted under article 739, C. P., no fact can be permitted to be alleged and proved which does not conduce to establish one of the causes of complaint specified in the article, and which, if verified, would not justify the making of the injunction perpetual. We are at a loss to perceive how a money claim (which is not liquidated, and compensated, and which is not even pleaded in *compensation*) for the alleged wrongful occupancy, and occupancy and enjoyment of the land seized, can assist in establishing any of the grounds upon which an injunction can issue under those provisions of the law. The plaintiff should have resorted to a direct action, and cannot be allowed to engraft this parasite claim on a proceeding originating in the form in which this began. Berens vs. Boutté, 31 An. 112.

We find that the judgment in the case, reported in 30 An. 1322, which is in evidence in this, on the plea of *res judicata*, can be success-

fully invoked in bar of the several matters raised in this litigation. The purpose of the suit decided was the annulment of the judicial adjudication made to the Citizens' Bank of the land seized in that case, and which is the same as in this case: the nullity of the sale made by the bank to Mrs. Jordan, after such adjudication; the validity of the mortgage; the question of title and its apportionment; in fact, other objects substantially identical with those in view in the present controversy. The *judicanda* and *the judicata* seem to have the same characteristic features as those found in the present instance.

One of the grounds of the petition is that the Citizens' Bank has no existence as a legal corporation; still the plaintiff asks that citation issue, and proceeds against it, *eo nomine*, in this litigation. The charge is inconsistent. There is no evidence in support of the allegation of forfeiture of charter, and, even if there were, how could it prove effectual when offered against the alleged defunct corporation *itself*?

The grounds of the petition were properly held self-destructive, the plea of payment considered.

Judgment was rendered accordingly, declaring the nullity of the sales attacked, defining title in those to whom said land belonged, recognizing the validity of the claim and mortgage annulled in the present case, reviving the rights of the parties dispossessed to sue and recover for the rent and revenue, if due, of the property from Mrs. Jordan. The judgment was pronounced contradictorily with the present plaintiff. It has become final and conclusive of the matters sought to be herein agitated.

A copy of the decree of the lower court maintaining the exceptions, and of the simultaneous order continuing the case for further trial to 25th of May, to enable plaintiff to prove his charges, was issued and served on the 14th of May, on one of the counsel of record of plaintiff. On the 25th of May the plaintiff objected to trial on the grounds that the case had not been reached on the regular call of the docket and under the rules of the Court, and could not be taken up out of its order; that no answer had been filed; that defendant had waived and abandoned his right to have this case tried summarily, and had changed by his exceptions and pleas to the ordinary form; that the plaintiff had not been notified. The Court overruled the objections, and a bill was reserved.

There was no evidence offered in support of the first ground that we see.

The burden of proving it rested on the plaintiff. The District Judge may have had evidence on that point before him, but it has not come up to us with the transcript. The appearance of the defendant, excepting to the proceeding, and eventually requiring proof of the averments, is

a *regular* proceeding. The defendant *answered.* It is not necessary that an answer should formally join issue by *expressly* admitting or denying. It cannot be claimed that the defendant has *admitted* the facts averred by the plaintiff. On the contrary, the bank can and must be treated as *denying* them, as there was a call for proof in support of the same. By the appearances made the defendant has not changed the *character* of the proceeding. The defendant has excepted and answered. It is true that the bank has asked damages, but this may be considered as a demand incidental to the action, if authorized by law in this form, or as surplusage, if not sanctioned by law. Had the defendant reconvened and asked the Court to condemn the plaintiff to pay the amount claimed in the executory proceeding, such a course would probably have changed the character of the action. We consider that the *status* of the original and of the injunction cases has not been altered from *summary* to *ordinary*, and that the summary trial which was had is sanctioned by law. The service on the attorney of record, on the 14th of May, is sufficient to notify his principal of the continuance of a case for trial. It has been frequently held that, in some instances, the service of a citation on, or acknowledgment of, such service by an attorney of record will bind the client, unless on counter affidavit as to want of authority in the counsel as such. It was for the counsel, at the time the case was called, if reasonable grounds for a continuance existed, to have asserted and urged them. It does not appear that any such circumstances were represented to serve as a foundation for a continuance. Besides, the continuance was ordered upon sustaining the exceptions, *in open court.* The trial was therefore proceeded with regularly.

The early history of this case is to be found in 30 A. 1322. The facts announced are in evidence in this case, and are correctly stated. A perusal of the statement may be of interest to the parties concerned, but a repetition of the same on the merits of this case would prove tedious, onerous, redundant. On the plea of *res judicata* set up, which has been noticed, a reference to the nature of the suit and of the substance of the judgment was so made as to suffice to serve as a basis for the determination of all the matters in issue now before us.

The exceptions having been sustained and the plaintiff restricted to proof of payment, he signally failed to establish that mode of extinguishment, so difficult to substantiate when it has *never* occurred. 30 A. 1163. He applied for a commission, and propounded interrogatories which were crossed, and yet the commission appears in the record *unexecuted.*

The defendant having proposed on the trial to show *how* payments had been made, the plaintiff objected on the ground that the defendant could not rebut under the pleadings. This objection was overruled and

a bill reserved. The evidence was superfluous on the part of the defendant in injunction, and could only have relieved and benefited the plaintiff, who has therefore no cause for grievance.

The evidence offered by the defendant shows that what money was paid by the mortgagors was properly credited to those entitled to the credit; that the claim of the bank is correct; that the sum of $8665 was received by the bank from Mrs. Jordan, to whom the bank had sold the property after the adjudication of it to the bank; that this sum was so received in part of the purchase price and in no way for account of either her husband or the minors, plaintiffs in this case, who are the debtors of the bank. To Mrs. Jordan *alone* it appertains to claim from the bank, which is, therefore, responsible to her *only*. She is not a party in any sense to these proceedings.

The defendant complains of the judgment of the lower court in this only, that it does not allow the damages claimed as consequent upon the dissolution of the injunction obtained without bond.

It was held in 15 L. 101, 4 A. 240, 19 A. 182, and 30 A. 316, that damages are not allowable in the same proceeding and summarily.

We have examined those adjudications, but we cannot assume to say that they are founded upon a misconception of the law. Had an injunction issued, in a case in which a bond was required and had been furnished, the Code of Practice, art. 304, provides that, on its dissolution the Court, in the same judgment, shall condemn the plaintiff and surety, jointly and severally, to pay to the defendant interest and damages. This article is substantially the original act of 1831, commented upon by the decisions to which reference is made. In such cases the Court would be justified thus to condemn the parties, owing merely to the existence of that special legislative authority, which cannot be extended to cases which it was not contemplated to comprise within its compass.

There is, indeed, no reason why a debtor who obtains upon rash sworn statements an injunction arresting without bond executory proceedings, issued against him on his confession of indebtedness in an authentic act, and who wrongfully impedes the process of justice, should not be summarily mulcted at the very moment that the dissolution is pronounced; but as was said in 30 A. 316: "The law is so clear, so free from doubt, that its letter cannot be disregarded, under the pretext of pursuing its spirit. It may be that it ought to be amended or changed; that as it is, it leaves the door too wide open to groundless defenses, to the litigation often resorted to to gain delay, but until changed or amended, it must be enforced as enacted."

In the case before us, what right the bank may have in damages for the wrongful issuance of the injunction is expressly reserved to be

asserted in a proper proceeding. The right, if any, of the defendant to claim value for the occupancy and enjoyment of the property between its adjudication to the bank and the nullity of that adjudication is likewise reserved.

We consider that, under the circumstances of this case, our decision on the differences of the parties will conclude them on the appeal taken by the plaintiff, returnable on the first Monday of June, 1881, to this Court in Monroe. In so declaring, we are supported by reason, and by the ruling in the unreported case of Baker vs. Richardson, decided here on July 3d, 1878, in which the Court said:

"All the parties are before us in the present appeal, and all the issues are presented therein. Our decree, on this appeal, will dispose definitively of those issues, and its execution cannot be retarded by the existence of another appeal, taken in the same case, from the same judgment. The judgment of a District Court may be thus retarded, but a judgment of the court of the last resort, between the same parties, upon the same issues, is final."

We think that the judgments of the lower court are correct, and have done justice to the parties.

It is ordered that the judgments appealed from be affirmed with costs.

No. 986.

STATE OF LOUISIANA EX REL. COBB & GUNBY VS. JUDGES OF THE CIRCUIT COURT OF APPEAL FOR THE SECOND CIRCUIT.

A case involving more than $200, exclusive of interest, and less than $1,000, on appeal from the late Parish Court of the Parish of Ouachita, to the late Fourteenth Judicial District Court for the parish of Ouachita, at the time of the adoption of the Constitution of 1879, should be transferred as directed by Act No. 29 of the Legislature of 1880, to the Court of Appeal for the Second Circuit, the only Court in the State now having jurisdiction of such a cause, under the present Constitutional organization.

The mode of trial of such cases shall be as provided for, in said Act No. 29 of the Legislature of 1880.

The title of said Act No. 29 is, in no manner, repugnant to Article 29 of the Constitution of 1879.

This Court will exercise its original power over all inferior Courts, as granted by Article 90 of the Constitution of 1879, to order the Courts of Appeal to try such cases.

APPLICATION for Writ of Mandamus.

Cobb & Gunby, Relators, *in propriis personis.*

W. W. Farmer and O. Mayo, Judges of the Court of Appeal for the Second Circuit, Respondents.

ON APPLICATION FOR MANDAMUS.

The opinion of the Court was delivered by

FENNER, J. Relators apply for a writ of mandamus addressed to the judges of the Court of Appeals for the Second Circuit of the State, commanding them to take jurisdiction of a certain cause on the docket of said court, in which relators are plaintiffs, and to proceed to the trial thereof according to law.

The substantial facts, stated as briefly as possible, are as follows, viz.: The case referred to is one in which the matter in dispute exceeds two hundred dollars, exclusive of interest, and does not exceed one thousand dollars. It was brought, tried, and decided in the late Parish Court of the parish of Ouachita.

An appeal was taken to the late Fourteenth Judicial District Court for the parish of Ouachita, which appeal was never disposed of, but was pending when said court was superseded, so far as the parish of Ouachita was concerned, by the present Fifth Judicial District Court, created under the Constitution of 1879. The judge of this last Court made an order directing that this and other similar cases be transferred for trial to the Court of Appeals for the Second Circuit, as directed by Act 29 of the General Assembly of 1880. The case was so transferred and placed on the docket of said Court of Appeals. At the first session of said Court in the parish of Ouachita, this cause was called for trial, when the counsel for defendants therein filed a plea to the jurisdiction of the Court, on the grounds that the Fifth Judicial District Court was vested with exclusive jurisdiction of the case; that it had been improperly transferred to the Circuit Court of Appeals, which was without jurisdiction to hear or determine the same; and praying that the cause be remanded to the said District Court to be proceeded with according to law.

After due hearing, the Circuit Court substantially sustained the plea, and rendered judgment annulling the order of the District Court transferring the case, and ordering the clerk to replace the case on the docket of the said District Court, to be proceeded with according to law. One of the respondents suggests question as to our power to grant the relief asked by mandamus. We have no doubt upon that point. The jurisdiction to try and determine the appeal in question rests either in the Circuit Court or in the District Court. It cannot rest in both. If it rests in the Circuit Court, it is the plain constitutional duty of that Court to exercise such jurisdiction and to hear and determine the cause; and an order declining such jurisdiction and remanding the case to a court which has no jurisdiction would be, on the hypothesis stated, a plain violation of duty, and a denial of justice, for which there would be no

other adequate remedy. The writ of mandamus is expressly authorized for the purpose of directing a court of inferior jurisdiction to perform some certain act belonging to the place, duty, or quality with which it is clothed; which is the precise relief sought in the present proceeding.

We took occasion, at the earliest opportunity offered after our accession to the Bench, in the case of State *ex rel.* Wells vs. the Judge of the Sixth District Court, to lay down some general rules by which we should ordinarily be guided in our exercise of the power of "control and general supervision over all inferior courts" granted us by article 90 of the Constitution. We there stated that we should exert that power through the medium of the writs of mandamus and other writs mentioned in said article, and that we should follow the provisions of the Code of Pactice regulating said writs; but that we considered article 839 of that Code, restricting the authority to issue the writ of mandamus to courts having appellate jurisdiction, as abrogated by the article 90 of the Constitution, which extended our power over *all* inferior courts. There is, therefore, no difficulty in the way of our granting the relief sought, if we shall determine that the respondents have jurisdiction over the cause in question, and have refused to exercise the same, and have unlawfully turned the case from their Court and remanded it to another Court having no jurisdiction over it.

We have most attentively studied the able separate opinions prepared by respondents in support of their decision on the plea to the jurisdiction.

They arrive at their respective conclusions upon radically different theories. One concludes that the District Court must hear and determine the case in the exercise of its original jurisdiction, treating the prior judgment of the Parish Court as merged into the judgment which may be rendered in the District Court. The other maintains the continued appellate jurisdiction of the District Court over the cause, and its duty to determine it in the exercise thereof. Either theory is maintained with great skill and plausibility. Both concur in the decree remanding the cause to the District Court.

In stating our own conclusions, we do not consider it necessary to answer all the arguments advanced by the respondents in support of their several theories, though we have not failed to weigh them, and satisfy ourselves that they are susceptible of complete refutation.

We think the following propositions are sustained by the plain letter of the Constitution of 1879, viz.:

1. The Courts of Appeal have exclusive appellate jurisdiction of *all* cases where the matter in dispute exceeds $200, exclusive of interest, and does not exceed $1000.

Const. Art. 95.

2. The District Courts have original jurisdiction of all matters exceeding fifty dollars, and have *no* appellate jurisdiction, except of appeals from justices of the peace involving an amount between ten and one hundred dollars.

Const. Art. 109.

3. The Constitution provides that *all* cases pending in *all* other Courts under the Constitution of 1868 shall be transferred to the Courts respectively having jurisdiction of such causes under *this* Constitution.

The foregoing express provisions of the Constitution cannot be gainsaid or explained away.

We proceed with the following additional proposition, which is indisputable in point of fact, and, as a consequence of the above, irrefutable in point of logic, viz.:

4. The cause in question here is an *appeal*, and, therefore, a case of *appellate jurisdiction*. It involves an amount exceeding $200, exclusive of interest, and not exceeding $1000. The only Court, under the present Constitution, having appellate jurisdiction over such a case is the Court of Appeals. Hence, under article 261 *ex vi terminorum*, this case was transferred to that Court.

All arguments against this proposition are either arguments *ab inconvenienti*, or attempts to array the alleged intent of the Convention, as implied in other articles, against its will as expressed in these articles of the Constitution, or efforts, by artful interpretation, to impress upon these latter articles a meaning of which their clear and unambiguous language is not susceptible.

We think it safest to stand by the plain letter of the Constitution; and that inevitably fastens the cause under consideration within the appellate jurisdiction of the Circuit Court of Appeals.

We next proceed to consider the effect of article 102 of the Constitution, which has lain as a stumbling-block in the path of our learned brothers of the Circuit Court. From what we have heretofore said, it is apparent that the Courts of Appeal are vested by the Constitution with jurisdiction of two classes of appeals, viz.: First, of appeals from the District Courts, in which the "original records, pleadings, and evidence" are necessarily, under pre-existing as well as existing laws, taken down in writing; and, second, of appeals from the late Parish Courts, in which, under the laws governing the same, the evidence is not necessarily taken down in writing.

Now, article 102 provides: "All cases on appeal to the Courts of Appeal shall be tried on the original record, pleadings, and evidence *in the District Court*."

It is perfectly clear that this article only applies to appeals from the District Courts. Any other interpretation would be absurd. To say

that this article excludes from the jurisdiction of the Courts of Appeal proper cases of appeal from the late Parish Courts, would be to annul the plain provisions of articles 95 and 261, as heretofore quoted by us. To say that such appeals are to be tried on "original evidence in the District Court," where no such evidence was ever taken, would be unreasonable. The article can have no rational meaning, except as confined to appeals from the District Courts.

It follows, therefore, that the mode of trying appeals from the late Parish Courts in the Courts of Appeal is not provided for in the Constitution. Does it follow that such appeals shall not be tried at all? Clearly not. Does it follow that, in the absence of any evidence taken down in the Parish Court, without fault of the parties, the appeals shall be tried without any evidence at all? That would be a farce.

With reference to these appeals, the Circuit Court occupies precisely the same position under the Constitution as the District Courts occupy with reference to appeals from justices of the peace. Article 111 provides: "The District Courts shall have jurisdiction of appeals from justices of the peace in all matters where the amount in controversy shall exceed ten dollars, exclusive of interest." The Constitution contains no other word touching these appeals. It does not provide how they shall be tried. We know that in trials before justices of the peace the evidence is not taken down in writing. These appeals will be tried in the District Courts *de novo*. Why? Because, under existing laws, the Legislature has provided that they shall be so tried, and, in the absence of constitutional provision on that subject, the Legislature had the right to regulate the mode of trial. So, in the case at bar, the Constitution not having provided the mode of trial for such appeals, it vested within the province of the Legislature to do so.

Now, by Act No. 29 of 1880 the Legislature has regulated all these matters, and has provided the mode in which the parties to such appeal as that under consideration may have their evidence taken and reduced to writing for use on the trial in the Courts of Appeal.

It has been objected that section nine of this statute and other sections touching the transfer of appeals from Parish Courts to the Courts of Appeal are in violation of article 102 of the Constitution, and of other articles regulating the jurisdiction of courts. From the view we have taken of these articles, it is clear there is no such repugnancy.

It is further objected that the title of the act does not conform to the requirements of article 29 of the Constitution. There is no force in the objection. The title is "to provide for the transfer of causes pending in the Courts established by the Constitution of 1868 to the Courts established by Constitution of 1879." The object stated is broad enough to cover every thing germane, incident to, or connected with the transfer

of causes. The purpose of transfer from one court to another is to secure trial in the latter, and provisions for the mode of trial are germane and appropriate under such a title.

See State vs. Henderson, 32 An. 779.

We thus, by simply following the letter of the Constitution, reach conclusions on this entire subject in harmony with the legislative interpretation of the Constitution, and are able to give effect to the legislative will upon matters within its proper and legitimate domain. At the same time, we reach a direct, practical, equitable solution of the vexed questions involved, under which the rights of all parties will be secured. It will lie within the province of the Courts of Appeal to make such proper order touching the notices and delays to be observed in taking the testimony under the statute as will secure promptness of trial and preserve the rights of parties.

For these reasons we are of opinion that the relators are entitled to the relief asked.

It is therefore ordered, adjudged, and decreed that the writ of mandamus herein issued be now made peremptory, commanding respondents to take jurisdiction of the case of Cobb & Gunby vs. H. W. O'Neil & F. P. Stubbs, No. 3 on the docket of their said Court, and to proceed to the trial and determination thereof according to law, and in accordance with such rules and orders touching the trial of causes as they may make in their said Courts.

No. 965.

STATE OF LOUISIANA VS. MARY JANE HENDERSON, ALIAS WILLIAMS.

Act No. 54 of the Legislature of 1880, providing for the qualifications and for the selection of jurors throughout the State, is not violative of Articles 29, 30 and 47 of the Constitution of 1879.

APPEAL from the Fifth Judicial District Court, parish of Richland. *Richardson*, J.

F. G. Hudson, District Attorney, for the State, Appellee.

John H. Dinkgrave for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The defendant, having been tried, convicted, and sentenced in the Court *a qua*, takes this appeal and seeks to have the indictment quashed and the verdict and sentence reversed, on the grounds: that the grand jury, by which the indictment was found, was not drawn

according to law, there not being fifty days intervening between the drawing and empaneling of such grand jury, as required by Act No. 44 of 1877, and that the Act No. 54 of 1880, in accordance with which the said grand jury was drawn and empaneled without said intervening space of fifty days, is unconstitutional, null, and void.

The objection was properly presented in the lower court, first, on a motion to quash the indictment, and, afterward, on a motion in arrest of judgment, both of which were overruled.

It is not disputed that the requirements of act 44 of 1877 were not complied with, and, if the case is governed by that law, it is settled that the non-compliance is fatal to the indictment and all subsequent proceedings.

State vs. Smith, 31 An. 406.

The drawing and empaneling of the grand jury, however, were in accordance with the provisions of section 2 of Act 54 of 1880, and if that act is constitutional, the errors assigned in behalf of defendant have nothing to rest on.

The constitutional objections urged are as follows:

1. That the act is violative of article 29 of the Constitution of 1879, in that *all* its objects are not embraced in its title.

This provision of our present Constitution requiring that "every law shall embrace but one object, and that shall be expressed in its title," has existed in prior Constitutions of this State, and in the Constitutions of many other States of the Union, and has been the subject of frequent judicial interpretation.

The universal tenor of the decisions in this and other States establishes,

First. That the mischief designed to be prevented by the provisions are, 1st, to obviate confusion in legislation by mingling in the same act entirely distinct and heterogeneous provisions; (Walker vs. Caldwell, 4 An. 298); 2d, to prevent *hodge-podge* or *log-rolling* legislation, bringing together in one bill diverse subjects with a view to combine in the support of the entire bill the advocates of each particular provision; People vs. Mahaney, 13 Mich. 494; 3d, to prevent surprise or fraud upon the Legislature or the people, by smuggling provisions into bills of which the title gave no intimation, and which might, therefore, be carelessly and unintentionally adopted.

13 Mich. 494.

Second. That this constitutional provision is to be construed liberally, so as to confine its operation to cases within the fair scope of the motives for its adoption and the mischief sought to be remedied thereby.

The whole subject matter is well discussed in Cooley on Const. Lim-

itations, pp. 141 *et seq.* Keeping the foregoing principles in view, let us examine the act in question. The title is: "An Act to carry into effect article 116; to provide the qualifications, and for the selection of competent and intelligent jurors throughout the State." Article 116 of the Constitution refers exclusively to the selection of juries. The sole subject of the act, therefore, is juries; its sole object is the selection and qualifications of jurors; and no object not directly connected with the constitution of juries is embraced in either the title or the act itself. The title of an act is not invalidated because it specifies several particular objects, all of which are properly referable to, and subdivisions of, a single general object. Thus, if the title had been "an act relative to juries" or "to provide for the constitution of juries," it would have covered provisions relative to qualification, selection, and all other details. And, so, if the title provides for the qualifications, selection, and any other details for the constitution of juries, these particulars do not form manifold objects, but are grouped together and form but a single general object.

We think the term "selection," as used in article 116 of the Constitution and in the title of this act is broad enough to cover provisions for the *drawing* of juries.

It is evident that the meaning of article 116 of the Constitution is to require the Legislature to pass general jury laws.

The word "selection" has no exclusive or sacramental application to the act of jury commissioners in choosing the persons to constitute the general venire list. It is equally applicable to the subsequent act of the same commissioners in choosing, by drawing from the general venire box, the names for service as grand and petit jurors. These two acts are merely successive steps in the process of ultimate "selection."

Webster defines the word "selection" to be "the act of choosing and taking from among a number." It would be hypercritical to say that the word strictly implies the element of choice or preference, which is absent from a mere drawing by chance. In common parlance, we often hear of choosing or selecting by lot.

We are bound to presume that the Legislature intended to use the word in its broadest signification, and to cover the "drawing" of the juries, since, otherwise, it would destroy the constitutionality of the provision; and words used in legislative acts are not to be subjected to nice philological criticism, when they are susceptible, according to general use, of a meaning consistent with constitutional requirements.

Second. It is claimed that the act violates article 30 of the Constitution, in amending a general law by reference to its title.

There is nothing in this objection. It does not amend any law nor refer to the title of any law. The words at the beginning of section two

of the act, viz.: "That jurors shall be drawn in the manner provided by law; provided"—are mere surplusage, and only a self-evident proposition. They may be stricken out without altering the effect of the section, and there remains a complete and independent provision amenable to no objection under this article.

Third. It is charged to be violative of art. 47 of the Constitution, because it enacts a special and local law by the partial repeal of a general law.

Not so. The provision of section two of the act is not a local or special law. It applies throughout the State, and to all cases falling within its terms.

It applies to every District Court, in any parish of the State, the term of which is fixed by law for the first Monday of April, 1880.

The subjects of general legislation necessarily admit of classification, and the act only becomes special when it discriminates between cases in the same class.

There remains to be noticed a bill of exceptions taken to the ruling of the judge in allowing two witnesses to testify, whose names did not appear on the indictment and had not been served on the prisoner.

We find no authority sanctioning such ground of exclusion, and think the ruling of the judge was entirely correct.

It is therefore ordered that the judgment appealed from be affirmed.

No. 961.

STATE OF LOUISIANA VS. M. M. GIVEN.

A mere clerical error in the Information, such as *cash* instead of *case*, cannot be considered a serious ground upon which to avoid the verdict of the jury.

Objections to the manner of drawing a *venire*, must be made on the first day of the week for which the *venire* was drawn. Act No. 44 of 1877.

Evidence of alleged misconduct of the sheriff and the jury cannot be examined and considered by this Court, unless embodied or attached to a Bill of Exceptions.

APPEAL from the Fifth Judicial District Court, parish of Richland. *Richardson*, J.

F. G. Hudson, District Attorney, for the State, Appellee.

R. Ray and D. C. Morgan for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. M. M. Given was prosecuted under an information by the District Attorney on a charge of horse-stealing, and after trial, was con-

victed and sentenced to imprisonment at hard labor for one year in the State Penitentiary. After an ineffectual attempt for a new trial, and an unsuccessful motion in arrest of judgment, he has appealed to this Court, seeks to avoid verdict of the jury, and to reverse sentence and judgment of the lower court, on the following grounds:

First. That the information is defective, because in the sentence which should read, "contrary to the form of the statute of the State of Louisiana, in such *case* made and provided," the information contains the word *cash*, instead of the word *case*.

Second. That Act No. 54 of the Legislature of 1880, under which the jury was drawn, is unconstitutional, and violates article 29 of the Constitution of 1879, and that said jury was not drawn conformably to the provisions of Act No. 44 of 1877, requiring the jury to be drawn fifty days before the assigning of the court.

Third. That after being charged by the judge the jury was allowed to separate.

1. The first objection was made the ground of the motion in arrest of judgment, and is apparently urged as a serious objection; but in our opinion it is simply the result of a clerical error, caused by an absence of mind in the District Attorney, who, unconsciously, wrote *cash* instead of *case*, as he evidently intended, as shown by the words preceding and following the objectionable word; just as defendant's counsel, in their manuscript brief, while arguing this very point, inadvertently wrote *care* for *case*. This ground is not serious, and is absolutely untenable.

2. The second ground was contained in a challenge to the array of petit jurors which were drawn for the third week of the court, by reason of the alleged unconstitutionality of Act No. 54 of 1880.

This objection should have been urged on the first day of the week for which the venire had been drawn, that is, on the 17th of May, 1880, but was made only on the 18th of that month; it was, therefore, too late, and cannot be considered. Act No. 44, 1877; 31 A. 91, 369.

3. The third objection has reference to the alleged misconduct of the jury and of the sheriff, for allowing one of the jurors to absent himself from the room when the jury was deliberating, and was made the ground for the motion of a new trial.

Evidence to show the alleged misconduct of the jury was introduced and taken down in writing, and is in the record, but it is not embodied in, or attached to, a bill of exceptions.

Under the Constitution and the well-settled jurisprudence of our State, established by numerous decisions, and recently re-affirmed by us in the case of the State vs. Charles Nelson, just decided, we have no jurisdiction in criminal cases over questions of fact, and can, therefore, take no cognizance of the evidence introduced in support of the alleged

misconduct of the sheriff and of the jury. We fully recognize, and shall in all proper cases exercise, our right to review the action of District Judges on motion for new trials in criminal causes, but when a question of fact is blended therewith, the facts must be made part of, or attached to, a bill of exceptions.

It is therefore ordered that the verdict of the jury in this case be maintained, and that the judgment of the lower court be affirmed with costs.

No. 968.

M. LEVY VS. V. A. WARD, ADMINISTRATRIX.

A contract, by which a plantation is sold for the sum of $2000, which the vendee agrees to advance in yearly instalments to the vendor, for the cultivation of the property sold, with a stipulation by which the vendee promises to reconvey the plantation to the vendor, on re-imbursement of the money advanced and interest—such a contract is not one of hypothecary or pignorative security; but it is a regular sale with the right of redemption, the title of which is only defeasible by the exercise of the said right of redemption.

APPEAL from the Sixth Judicial District Court, parish of Morehouse. *Vaughan*, Judge *ad hoc*.

Newton & Hall for Plaintiff and Appellee.

Bussey & Naff and Boatner & Liddell for Defendant and Appellant:

If, at the time of the sale, the contract was wanting in any of the requisites of a real sale, these defects cannot be cured or remedied by any subsequent verbal agreement or transaction between the parties.

When the thing sold remains in the possession of the seller, the law raises the presumption of simulation; and the buyer must remove the presumption. 30 An. 968; 28 An. 357; 23 An. 666; 19 An. 53; 15 An. 555; 5 An. 99; 1 An. 132.

A simulated title gives neither possession nor title; and no act of the parties thereto can affect the rights of creditors.

Documents, in the form of a sale, shown by a counter-letter to have been made without such intention, cannot serve as a sale. 5 An. 99; 10 An. 691; 23 An. 658, 666; 28 An. 357; 31 An. 248.

The administratrix represents the creditors.

The prescription of one year does not apply to a simulated sale.

The opinion of the Court was delivered by

FENNER, J. On November 15th, 1873, George C. Ward executed an

act of sale by the terms of which, in consideration of the price of $2000, receipt of which is acknowledged, he conveyed his plantation to M. Levy, plaintiff in this suit. Said deed contained the following pact: "It is specially understood, between said parties, that, in case the said Ward, or his heirs, should, at any time hereafter, pay said Levy or his heirs the amount he paid for said land, together with eight per cent per annum interest thereon, from January 1st, 1874, said Levy, his heirs, or assigns are to make him, said Ward, or his heirs, a title to said land, and relinquish any claim thereon."

On the same day the parties, Ward and Levy, executed two other agreements or counter-letters, both of which are found in the record. One of these counter-letters is in the following words: "Be it known that on this 15th day of November, 1873, the following contract and agreement was entered into between Geo. C. Ward and Michel Levy, to wit: Said Levy has this day agreed to forward and advance to said Geo. C. Ward necessary supplies to enable him to cultivate his plantation situated in this parish, for the year 1874, and for a further length of time, if said Ward should desire it, to an amount not to exceed one thousand dollars any year, together with dry goods, stock, and other necessaries, which amounts are to be shown by M. Levy's books. And the said Ward has, this day, in order to secure the said Levy in the payment of any amounts he may advance him, transferred to said Levy his plantation in this parish, with the understanding and agreement that he, said Ward, is to stay on said plantation and cultivate the same free of any rents, and with the further understanding that he is to have the privilege to redeem said land, by paying said Levy the amount advanced him, at any time. It is further understood that said Ward is to have the privilege to rent said plantation if he should desire it. It is further understood that said Levy is to ship the cotton raised by said Ward each year, and that they are to have a settlement showing how they stand financially on or about the 15th of April annually. It is further understood the consideration in said act of sale is two thousand dollars, which in fact has not yet been paid, but is to be paid in said advances as aforesaid, advanced this year, and to be advanced hereafter."

The foregoing is signed by both parties, in presence of two subscribing witnesses, and is verified by the affidavit of one of said witnesses made on the day of its date, and was, on the same day, duly recorded, as appears from the certificate of the recorder, indorsed thereon.

The other agreement or counter-letter, though differing in some respects from the foregoing, we do not deem it necessary to copy, for the following reasons: Mr. Levy testifies, and the counsel for defendant does not contest, but substantially admits, the truth of his statement, that *one* of the counter-letters was annulled, after being signed,

and the other was drawn as a substitute for it. The question as to *which* of the two was canceled and which remained in force is not clearly stated in the record. We are satisfied that the one copied by us above is the one last drawn, and which remained in effect, for the following reasons, viz.:

First. It is much more carefully and correctly drawn and expressed than the other.

Second. It contains the verifying affidavit of one of the subscribing witnesses, which the other lacks.

Third. It was the one actually recorded and left of record from the 15th of November, 1873, until the 10th of January following, when the record was annulled.

These circumstances produce the conclusive impression on our minds that this recorded counter-letter was the last one drawn, and the one which embodied the final agreement of the parties; and although both the originals remained extant and were offered in evidence by the defendant in this case, we shall treat the one recorded, and which we have copied herein, as the only one entitled to consideration.

To proceed with the history of the transaction: Levy proceeded to make advances to Ward in accordance with their understanding, and the evidence establishes that sundry settlements were had as stipulated, from which it appears that at the date of the sale (covered by the phrase in the counter-letter, "advanced this year and to be advanced hereafter") Ward owed Levy $815 91; on April 16th, 1874, he owed him $1153 17; on May 10th, 1875, $1595 99; on April 15th, 1876, $1985 73; on March 16th, 1877, $2291 57, or $291 57 more than the whole price which was to be paid in these advances; and on December 14th, 1877, the date of Ward's death, $3167 62, or $1167 62 over and above the stipulated price.

Ward remained in possession of the plantation, as stipulated in the counter-letter, rent free, until 1876, when the balance due Levy on the settlement of that year being nearly equal to the entire price due under the sale, it appears that an informal lease was made by Levy to Ward of the plantation at a rent of four dollars per acre for the cultivated portion, about ninety acres, for which a sort of note or due-bill was given by Ward. At the same time, an incomprehensible agreement was executed by Levy, in the following words: "I, Michel Levy, acrees for the rent of the land for the year 1876, when collected, to be placed to the credit on note or account of G. C. Ward, if there is any amount over and above of the nett proceeds of cotton when shipped for my account after paying for provisions furnished and dry goods to be placed credit on said Ward note."

We have struggled in vain to determine satisfactorily the meaning

of this enigmatical utterance; but it seems of little consequence, since, in the following year, 1877, the parties entered into a formal contract of lease, by the terms of which it is stipulated that "the said Levy hereby leases unto said Ward his plantation known as the Ward place, being the same place which the said Levy purchased from me on the 15th November, 1873, etc.;" and further on, that "said Ward agrees to take good care of said plantation, and the buildings and improvements, and to deliver the same in like good order and condition at expiration of lease to said Levy," etc. The rent is fixed at $349 06, for which Ward gave his rent-note; and there is no pretense of any outstanding agreement, verbal or written, to impugn the reality of this transaction. On the 14th of December, 1877, during the pendency of this lease, and while holding thereunder, Ward died.

His administratrix caused the plantation to be inventoried as part of his estate; subsequently obtained from the probate court an order for the sale thereof, and advertised the same for sale, when her further proceedings were arrested by the injunction issued in this suit.

Plaintiff, in his petition herein, sets forth his title and ownership of the property, the lease thereof to Ward, the alleged illegal detention of the property by the administratrix, her proceedings for its sale, with other appropriate allegations to sustain his claim for injunction; and asks a judgment perpetuating the injunction, decreeing him to be the owner of the property, putting him in possession thereof, and for further judgment for rent at the rate of $500 per annum from 1st January, 1878, the date of expiration of the lease to Ward, until his restoration to possession.

Defendant answered, denying the ownership of plaintiff, averring that the sale from Ward to plaintiff was a pure simulation; that it was given in fraud of creditors; that if plaintiff acquired any rights under the deed, those rights were hypothecary in their nature, and only intended to secure payment of advances made; that the property remained the property of Ward and of his succession, and should be sold in settlement of the latter; and prayed for judgment dissolving the injunction, decreeing the property to belong to the succession, and for damages against the plaintiff.

Upon these issues and on evidence substantially establishing the facts hereinbefore stated, the lower court gave judgment in favor of plaintiff substantially as prayed for, except as to his demand for rent, which was rejected. From this judgment defendant has appealed.

The view we have taken of the case dispenses us from the necessity of passing upon the numerous bills of exceptions taken by either party to the record.

The deed from Ward to Levy is a perfect and complete sale with

the right of redemption. All the elements essential to constitute a sale concur therein, the thing sold, the price, the consent. The right of redemption is stipulated in strict accord with art. 2567 of the Code.

The counter-letter, properly construed, taken as part of the entire contract, does not rob it of any of these essential elements, but, on the contrary, confirms and establishes the existence of every one of them.

1. As to the *thing* and the *consent*, the counter-letter affirms anew that Ward has "transferred to said Levy his plantation in this parish," thus ratifying the consent, and again identifying the thing.

2. As to the *price*, the counter-letter distinctly states that "the consideration in said act of sale is two thousand dollars, which in fact has not yet been paid, but *is to be paid* in said advances as aforesaid advanced this year, and to be advanced hereafter." This absolutely bound Levy to pay the price in the manner stipulated.

3. As to the right of redemption, it is repeated in the counter-letter substantially as set forth in the deed, by the following language: "He (Ward) is to have the privilege to redeem said land by paying said Levy the amount advanced him, at any time"—which language, taken in connection with the fact that the price was to be paid in "advances," is equivalent to a reservation of the right to redeem on paying to Levy the *price*, or such portion thereof as might have been paid; with, no doubt, the added requirement to pay back any excess of advances over the whole price. That there should ever exist any such *excess* doubtless did not enter into the contemplation of the parties at that time; but we can see no objection to a vendor with right of redemption thus qualifying his right and enlarging his obligation if he chooses so to do.

The features of the counter-letter above referred to distinctly differentiate this case from all of those referred to by the counsel for defendant and carefully examined by us, in which it has been held that contracts in the form of sales, but where it appears in the stipulations of the deed or from contemporary counter-letters that no sale or other contract translative of property was intended by the parties, that no price was paid or intended or required to be paid, and that the title was passed to the transferree, not as owner, but solely as security for debt, did not operate to confer ownership on the transferree, but merely gave him a hypothecary right on the property.

Here, on the contrary, it distinctly appears from the counter-letter itself, that a real sale was intended, conferring upon the vendee a real ownership, defeasible only by the exercise of the right of redemption reserved to the vendor, in accordance with the the terms thereof, and that there was a real price, which the vendee was bound to pay in the manner stipulated, if required by the vendor.

No doubt the counter-letter does establish that the motive of the

transaction was to enable Ward to continue the cultivation of the place, and to supply him with funds for that purpose, with the expectation that the results of the cultivation would enable him to repay the money advanced by Levy out of the proceeds of crops raised. If this expectation had proved well founded, and if the crop of any year had repaid all the advances previously made by Levy, the effect would have been that no part of the price would have been paid by Levy, and that Ward would have been free to re-enter into the property and require a reconveyance under his equity of redemption, without having any thing to repay to Levy. But when the crops raised fell short of repaying the advances made, the surplus unquestionably was attributable as a credit on the price due by Levy under the very terms of the counter-letter. Levy was bound to continue the advances until the surplus thereof, over and above the proceeds of crops, equaled two thousand dollars, which would have operated a complete payment of the price. He would not have been bound to make further advances, and having then paid the whole price of the sale, would have been entitled to take possession of the property, subject still, of course, to Ward's right of redemption.

The execution of the contract by the parties fully confirms this construction. Levy made advances as he had agreed to do. As long as the surplus of advances over proceeds of crops was less than $2000, the agreed price, he left Ward in possession, rent-free, as stipulated, and did not interfere with his administration of the property. But when in 1877 the surplus of advances exceeded $2000, thus operating full payment of the entire price, we find that the parties enter into a formal contract of lease at a fixed rent, by which Ward recognizes Levy's full ownership and right of possession, accepts tenancy under him, and obligates himself "to take care of said plantation, and to deliver the same in like good order and condition at the expiration of the lease to said Levy," etc.

There is absolutely nothing in the record impugning or tending to impugn the reality of this lease. We consider it as furnishing the authoritative construction placed by the parties themselves on their former contract, establishing and acknowledging Levy's ownership and right of possession of the property in such manner that neither Ward nor his legal representative can question it.

Although we have critically examined the whole jurisprudence on the subject of contracts of this kind, the conclusions reached by us as to the facts in this case dispense us from the necessity of reviewing them. We simply say that here there was a real contract, a real price, and that the absolute and unconditional obligation of the vendee to pay the price appears as well in the counter-letter as in the deed. This Court has never, in any case, held that where the absolute obligation for the price subsists, the co-relative right can be less than a right of ownership.

The ownership thus translated may be intended or expected, in the contemplation of the parties, to have, in some sense, a pignorative or hypothecary effect, but it is nevertheless an ownership, defeasible only by redemption under the stipulations of the contract.

The view we have taken establishes that the contract was, in no sense, simulated. We do not think it was subject to attack as being in fraud of creditors, Ward not being shown to have been insolvent at the time the contract was entered into; but, on the contrary, the price due by Levy being greater than all his debts. Besides, the only creditor of Ward's succession is E. J. Hope, and as to him the revocatory action is barred.

So far as the necessitous wife's claim is concerned, that only originated at the husband's death, and does not give her the right to the revocatory action as to antecedent contracts.

We think Levy's right to possession was absolute from the first of January, 1878, and he is entitled to rent from that date; but we do not think the evidence establishes, with sufficient clearness, the amount of the rent, or who has occupied the premises, the petition alleging that the administratrix and other persons were in possession of the property. Under the amendment prayed for by appellee's counsel, we shall change the judgment as to the rent to one of nonsuit.

The question as to whether a right of redemption remains in the succession of Ward is not presented here, and the rights of the succession will not be prejudiced by the decree herein.

It is therefore ordered, adjudged, and decreed that the judgment herein appealed from be amended so far as the same rejects the claim of plaintiff for rent, and that said claim for rent be only dismissed as in case of nonsuit, and that in all other respects said judgment be affirmed, defendant and appellant paying costs in both courts.

Mr. Justice TODD is recused in this case, having been of counsel.

No. 976.

SUCCESSIONS OF M. S. AND POLLY CASON. ON OPPOSITION OF ELIZABETH THAMES, AND OPPOSITION AND INTERVENTION OF MURRELL & BARNES.

The widow of a second marriage, in necessitous circumstances, is entitled to the $1000 homestead upon the property of the Community of acquets and gains which existed between the deceased husband and his first wife; and the said widow's privilege is superior in rank to the special mortgage of the creditors of that former Community.

APPEAL from the Parish Court, parish of Claiborne. *McClendon*, Special Judge.

Jas. F. Taylor for Opponents and Appellants:

The community of a previous marriage must be settled and the debts paid before the widow of a subsequent marriage can claim the thousand dollars gratuity out of the property of the first community. C. C. 2402; 29 An. 583; 31 An. 495; 21 An. 520; 6 An. 441; 5 N. S. 568.

John Young and John S. Young, contra.

The opinion of the Court was delivered by

FENNER, J. M. S. and Polly Cason were husband and wife. Polly Cason died in 1877. M. S. Cason married Elizabeth Thames in 1878, and shortly thereafter died, leaving her a necessitous widow. The succession of M. S. and Polly Cason was then opened. The property inventoried was, nearly all, property of the community of acquets and gains which had subsisted between M. S. and Polly Cason. The most important part of the property was a tract of land belonging to the community, upon which Murrell & Barnes held a mortgage for a community debt. The contest here is between Murrell & Barnes, claiming as creditors of the community, to be paid by preference out of the community property, and Elizabeth Thames, widow of the second marriage, claiming to be paid $1000 as widow in necessitous circumstances, by preference over all creditors.

There is no dispute about the essential facts, viz.: 1, that Elizabeth Thames is a widow in necessitous circumstances, entitled to the homestead claim; 2, that Murrell & Barnes are creditors of the community of the first marriage; 3, that the property sought to be subjected to their respective claims was property of this last mentioned community.

The theory of the counsel for Murrell & Barnes, urged with great ingenuity and plausibility, is based on the following propositions:

First. That, as laid down by this Court in Childers vs. Johnson, 6 An. 441, "This community, like other partnerships, must be considered as an ideal being, *être moral*, distinct from the persons who compose it, having its rights and obligations, its assets, its liabilities, its debtors, and its creditors."

Second. That, therefore, the property belonging to the community, like the property of an ordinary partnership, does not belong to the partners, as individuals, and does not pass into, or become part of their respective successions at their deaths; but that their successions acquire nothing except the *residuum* which may remain after settlement of the community debts. Suc. Staffer, 21 An. 520.

Third. That the claim of the necessitous widow only attaches to the property of the husband's succession, and, therefore, only to his in-

terest in the *residuum* which may remain of community property after paying the community debts.

If this theory were correct, it would operate not only to shut out the second widow's claim under the facts of this particular case; but it would equally operate to shut out the claim of every necessitous widow from attaching to the property of an insolvent community, and would thus render the widow's homestead-act practically inoperative in nearly every case.

We cannot maintain a doctrine leading to consequences so inharmonious with the humane purposes of the law, and with the mode of execution thereof, which has prevailed without question, from the time of its adoption. The fallacy of the theory consists in subjecting the community of acquets and gains to all the rules and principles governing partnerships. The Code is quite careful in informing us that "the community of property created by marriage is not a partnership." Rev. C. C. 2807.

While there are points of resemblance between this community and partnership, there are very marked and distinctive differences.

During the existence of the community, the husband is practically the owner of the community property, which he may sell, dispose of, and encumber, by onerous title, at will, and without the concurrence of his wife. He is personally responsible for all of its debts. At his death it enters into and forms part of his succession, to be therein administered and devoted to the payment of the community debts, which are also his personal debts. The wife has no personal liability for the debts, and has no interest whatever in an insolvent community. In case of the dissolution of such a community by the prior death of the wife, her succession or heirs have no valuable interest in the community property.

If, as in this case, the community be admittedly insolvent, they have no interest, and, consequently, no right, to provoke its liquidation. As to the community creditors, they are under no necessity to provoke its liquidation through the medium of the wife's succession, because it is settled they may disregard the wife's interest, and proceed directly against the community property in the possession of the husband, contradictorily with him alone. 26 An. 230, 391, 294.

The property, therefore, remains in the possession and control of the husband, subject to the claims of the community creditors, and at his death falls into his succession, and is liable to the necessitous widow's privilege, after exhaustion of his separate estate, just as it is liable to funeral charges, expenses of last illness, and other privileged claims, in the rank fixed by law.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed at appellant's costs.

No. 985.

BOARD OF SCHOOL DIRECTORS OF UNION PARISH VS. J. E. TRIMBLE.

The obligation of the Treasurer of the School Board of Union Parish to account for funds received by him in that capacity, is one *ex contractu* and fiduciary in its character, and is only barred by the prescription of ten years.

APPEAL from the Eleventh Judicial District Court, parish of Union. *Graham*, J.

Allen Barksdale, District Attorney, and Geo. A. Killgore, Jr., for Plaintiffs and Appellants:

First—One holding for another cannot plead prescription of any term of years against the demand of the owner for the thing so held. C. C. 3436.

Second—Action to rescind a settlement on account of error or fraud is not prescribed by one year; only ten years prescribe such an action. C. C. 2221 (2218); 2 A. 443.

Third—Actions against agents and depositaries for *damages* caused by their fraud, or negligence, or mismanagement, are only prescribed by ten years. 7 R. 513, 3 L. 591.

Richardson, McEnery & Young, W. R. Rutland, E. E. Kidd, and John Young for Defendant and Appellee:

An action brought against an officer for the alleged fraudulent withholding of public money in his charge, is an action *ex delicto*. It is the alleged wrong which has been practiced that gives the character to the suit. The prescription of one year applies to such an action. 31 An. 529; 3 La. 338; 31 An. 567; 6 Rob. 382; 14 An. 389; 15 An. 418.

A settlement, as between the parties to it, has the force and effect of a judgment. It is an adjudication of the respective claims of the parties in interest.

Where a suit is brought to annul the settlement on the ground of fraud, it must be alleged that the discovery of the fraud practiced was made within one year of the date of filing the suit.

Where error and fraud is alleged to have been practiced in a settlement which has been made, the items of error in the settlement must be specifically alleged and proved. 9 Rob. 119.

The opinion of the Court was delivered by

LEVY, J. The plaintiffs, constituting the Board of School Directors of the parish of Union, instituted suit against J. E. Trimble, on the 22d of September, 1877, in which they sought to annul a settlement made

by the defendant as Treasurer of the School Board of said parish in the year 1875 with the Board then in existence, on the ground that said settlement was false, fraudulent, erroneous, and null and void; and further praying for judgment against defendant for the several sums of $4262 59, $872 57, $763 90, and $10,000, alleged to be due the plaintiffs, in their official capacity, by the defendant; these sums being alleged as due, not having been legally and properly accounted for by defendant, late Treasurer as aforesaid. The defendant filed an exception containing two points, first, to the vague and indefinite allegations of fraud and error in the settlement made between the Board of School Directors and defendant, on the 17th of August, 1875, and that the petition did not set forth specific items in which error and fraud occurred, and therefore that the allegations were insufficient to place the defendant upon a defense of what particular items are complained of. Second, the plea of prescription of one and two years in bar to plaintiffs' demand.

Another exception was filed, averring no cause of action; there was a motion by defendant to compel plaintiffs to elect, on the ground that several inconsistent actions were cumulated in the same suit or demand. The motion to elect and the exception of no cause of action were overruled and the plea of prescription was sustained, and judgment dismissing the suit at plaintiffs' costs. From this judgment plaintiff has appealed.

We find no error in the rulings of the court as to the plea of no cause of action and on the motion to elect. The question for our consideration and decision is, should the plea of prescription be sustained.

The defendant contends that this is an action *ex delicto*, and that the prescription of one year applies thereto; that the settlement between the parties has the force and effect of a judgment, and that a suit to annul the settlement on the ground of fraud must contain the allegation that the discovery of the fraud was made within one year of the date of filing the suit, and that where error and fraud are alleged as to the settlement, the items of such error must be specifically alleged and proved.

This action is not in our opinion one which arises from an offense or quasi offense. It is brought to annul a settlement alleged to have been made in fraud and error, by which an officer of the School Board, who was virtually an agent of that Board and received and held funds for them subject to their control and disposition only, is charged with a responsibility and liability for those funds which are retained by him, and withheld from those rightfully entitled to them, under a settlement or transaction averred to be fraudulent and erroneous. The obligation of the defendant, independent of that created by his official bond, was

one *ex contractu*, or an implied contract, and the violation of any of the duties or obligations arising therefrom, renders him liable, and an action therefor is only prescribed in ten years. The obligation may exist without the bond; it springs out of the relation which defendant bore to the plaintiffs, fiduciary in its character, and not falling under the prescription claimed by defendant. We do not think the decision in 31 An. 567, City of New Orleans vs. Southern Bank, controls the question in this case or is applicable to it. The Court there says: "The characteristic, therefore, of offense or quasi offense is that the act from which the obligation arises is unlawful. The marked distinction, then, between a quasi contract and an offense or quasi offense, is that the act which gives rise to a quasi contract is a lawful act, and therefore is permitted; while the act which gives rise to an offense or quasi offense is unlawful, and therefore is forbidden." "The distinction between damages *ex delicto* and *ex contractu* is, that the latter ensue from the breach of a special obligation, and the former from the violation of a general duty." In that case the Court observed "that Dubuclet (State Treasurer) was to receive only money, and he did not receive money, but bonds, and his act was therefore unlawful, and is an offense or quasi offense." In this case the defendant did receive moneys, which he had a right to receive, and his act was therefore lawful, and being a "lawful act," and "permitted," gives rise to a quasi contract. In the case of Wood et al. vs. Foster, 3 La. 338, it is shown that "the complaint of the plaintiffs is that their property was *illegally taken possession of* by a commercial firm, of which the defendant is the surviving partner. The suit in this respect seems to be intended to enforce the performance of an obligation *not arising from a contract either express or implied by law*, but one created by the acts of Foster & Hutton, injurious to the plaintiffs, without relation to any agreement; a consequence of an act by which they were deprived of the enjoyment and possession of their property; an injury done not in violation of any contract or quasi contract, but by illegal conduct in taking property without the consent of those who allege themselves to have been owners."

As we have before said, the cause of action herein is not *ex delicto*, but we regard it as being *ex contractu*, or on an implied contract, and we are sustained in our views as to the non-applicability of the plea of prescription made by the defendant in this case. The case of Mulford vs. Wimbish, 2 An. 443, conclusively establishes the prescription which applies to actions for the nullity or rescission of agreements. The Court held: "The prescription established by article 2218 relates to cases of error, fraud, or violence in agreements which are expressly included in it." And "this article 2218 relates to the action of nullity or of rescission of agreements, and provides that in all cases in which either action

is not limited to a shorter period by a particular law, it may be brought within ten years." 20 An. 151; 9 Rob. 396; 11 An. 554; 21 An. 492.

In the case of Percy and others vs. White and others, reported in 7 Rob. 513, it appears that certain stockholders of the Planters' Bank of Louisiana instituted suit against the defendants, who had been directors of the bank, charging defendants with fraud and negligence in the discharge of their duties as directors, whereby the institution was ruined and the stock lost, and the Court held "this is an action of damages *ex contractu* against mandataries;" and, holding that more than ten years had elapsed since any act which proved injurious to the interests of the stockholders, sustained the plea of prescription. See, also, 7 Rob. 369.

We think the lower court erred in sustaining the plea of prescription made by the defendant.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; that the plea of prescription of one and two years be overruled, and that this case be remanded to be proceeded with according to law, and that the appellee herein do pay the costs of this appeal.

No. 963.

STATE OF LOUISIANA VS. W. L. THOMPSON.

In a prosecution for embezzlement, the receipt of the prosecuting witness for the amount alleged to have been embezzled, given subsequently to the Indictment and arrest of the prisoner, is not admissible in evidence.

It is no defect in the Indictment, that it does not describe the sum of money alleged to be embezzled, as consisting in coins or bank notes.

The whole Record of a suit having been offered in evidence by the accused and admitted without objection, the Court had no right to prevent him from reading certain parts of the Record to the Jury in the argument. For this reason, the verdict and sentence should be set aside, and the case remanded.

APPEAL from the Superior Criminal Court, parish of Orleans. *Whitaker*, J.

J. C. Egan, Attorney-General, for the State, Appellee.

James C. Walker and C. McRae Selph for Defendant and Appellant:

First—The judge should limit his charge to giving the jury a knowledge of the law applicable to the case; and when he undertakes to define a crime, he should use clear and intelligible language.

Second—It is irregular, and the example open to abuse, that the judge should warn the accused not to compel the court to pass so frequently on matters of evidence in the presence of the jury.

Third—Evidence should be received to show that money alleged to have been embezzled has been paid to prosecuting witness by the accused since his arrest.

Fourth—When a bill of exceptions does not contain the true grounds of the judge's opinion, he should decline to sign it, instead of contradicting the facts as set forth in the bill.

Fifth—The accused has the right to read his plea to the jury empaneled to try the charge against him.

Sixth—The giving of a check in payment of a sum of money alleged to have been embezzled, does not tend to prove the crime charged, and therefore is inadmissible as evidence in the cause.

Seventh—When the record of a judicial proceeding has been introduced in evidence, and filed on the trial of a cause against an accused, he has the right to read the whole of it or a part only to the jury, on the argument of the case; and the judge has no authority to restrain or control his discretion or choice in this respect.

Eighth—The burden of proof is on the State to prove that an attorney-at-law on trial for embezzlement has feloniously kept more than his fees out of the amount collected by him for his client, and the accused should be allowed to offer evidence of the value of the services he claims to have rendered.

Ninth—When the thing alleged to have been embezzled is not indicated by the indictment, the defect is one of substance, and not one of form, and the omission vitiates the indictment. It should set forth whether the money alleged to have been embezzled consisted in gold or silver dollars, or in currency.

The opinion of the Court was delivered by

LEVY, J. William L. Thompson was indicted on the 22d of July, 1879, on the charge of embezzlement, was tried by a jury, found guilty, and sentenced to one year imprisonment at hard labor in the State Penitentiary, and to pay the costs of prosecution. The accused made a motion for a new trial, which was overruled, and he has appealed.

The indictment charges "that one William L. Thompson, late of the parish of Orleans, on the 21st of January, 1879, with force and arms, and within the jurisdiction of the Superior Criminal Court for the parish of Orleans, being the attorney of one John G. Dyer, did, by virtue of such employment, then, and while he was so employed as aforesaid, receive and take into his possession certain money, to wit., the sum of one hundred and fifteen dollars and ten cents, for and in the name and on the account of the said John G. Dyer, his employer, as aforesaid, and the said money of him, the said John G. Dyer, so received by the said William L. Thompson, as aforesaid, he, the said William L. Thompson,

did, then, fraudulently and feloniously, wrongfully use, dispose of, conceal, and otherwise embezzle," etc., with the usual and statutory closing of the indictment.

We find several bills of exception taken to the charge and rulings of the court, on which the accused relies for a reversal of the judgment in this case. We will consider them as presented in the brief of his counsel.

The first bill of exception is to the charge given by the judge to the jury. The accused requested the court to charge "that all attorneys-at-law in this State have a special privilege in judgments obtained by them." The court did so charge, and added the following: "That if the defendant kept more than his fee out of the amount of the reception of the money, and feloniously converted the balance to his own use by embezzling it, he was guilty as alleged." The charge was given by the court as requested by the accused; it was a proper charge; the additional words did not annul, change, or vitiate this charge, and contain nothing which is illegal, and no expression of opinion as to the facts; the hypothesis and deduction therefrom do not constitute the statement of any illegal proposition or comment upon the facts, and cannot be considered as calculated to mystify the jury or prejudice the accused. It might have been more concise, and, perhaps, it contained redundancy, repetition, or innocent surplusage, but still it affords no ground for reversal of the judgment.

The next bill of exceptions was taken to the declaration made by the judge: "That he warned the accused, in a friendly spirit, not to compel the court to pass so frequently on matters of evidence in the presence of the jury." In the language of the judge: "This warning was given in a friendly spirit, not to compel the court to pass so frequently on matters of evidence in the presence of the jury. This warning was matter of humanity, to shield the accused from the consequences of his manifest indiscretion." We are unable to perceive in what manner the accused was injured or prejudiced by this declaration or warning. Instead of manifesting any disposition to curtail the legal rights of the accused, it seems to have been intended to operate as a warning in his interest, and a humane intimation in his behalf. However it may be regarded by the accused himself, and the motives of the judge *a quo* misunderstood or misinterpreted by him, it did not, in our opinion, injure him, and was not calculated to create any unfavorable impression upon or prejudice the jury against him. The fact that the accused conducted his own defense, and acted as his own lawyer on the trial of the case, may well have influenced the court, in this instance, in counseling and advising him, as complained of. It affords another illustration of the truth that gratuitous advice is never very highly appreciated.

The fourth bill of exceptions is taken to the refusal of the court to allow the accused to introduce in evidence the prosecuting witness's receipt for the money which the accused is charged with having embezzled from him. In the bill, the accused states that the District Attorney did not object to the introduction of this evidence, and that the court, *ex proprio motu*, and without objection from the District Attorney, refused to allow said receipt to be introduced in evidence. In the bill the court, in its reasons for such refusal, states "the District Attorney objected to the introduction of the receipt when offered in evidence, on the ground that it and the record showed it was dated after the indictment and arrest of the accused in the present case, and the court held the objection good." While the statements of the accused and of the court set forth *in the bill* are thus contradictory, we are of opinion that the statement, reasons, and grounds embodied therein by the court must be regarded as correct and accepted as true, and must be considered by us, rather than the adverse statement of the accused. If the court had refused to sign the bill of exceptions tendered by accused, the law points out the means by which he might be compelled to perform that duty. C. P. 899. But no step has been taken herein. The reasons and statement of the court form a part of the bill of exceptions; no question of their correctness was raised, as appears by the record; but incorporated in the bill and presented to us without question in the court below, they are brought before us by the accused appellant himself, and we treat the statement of the court as entitled to full weight, and conclusive as to the facts recited. We think the court properly refused to allow the evidence. The receipt, given subsequent to the indictment and arrest, could not affect the guilt or innocence of the accused on the charge for which he was indicted, was wholly irrelevant, and therefore there was no error in the ruling of the court.

The objection alleging a defect in the indictment as not setting forth and describing that the sum of money declared to have been embezzled consisted in coins or bank-notes, etc., has no weight. Rev. Stat. § 1061.

As to the exception to the admission in evidence of the check signed by the accused, and dated January 25th, 1880, we can see no reason why it should have been excluded. It was properly admitted as a part of the transaction out of which the offense charged grew, and was admissible as a circumstance or fact to show the receipt of the money alleged to have been collected, and may be regarded as a part of the *res gestæ*.

A serious, and, to our minds, insuperable objection in this case, which goes to the validity of the proceedings had on the trial, is set forth in the bill of exceptions, in which the accused complains that the court refused to allow the defendant to read *only* a portion of the record of the suit of Dyer vs. Burdeau to the jury in argument. In this bill,

the court in the statement and reasons shows that "in his argument the defendant read to the jury the parts of the record excluded by the court. It has been established by credible testimony, that the services of the defendant were engaged by Dr. Dyer for a stipulated sum; that the sum had been paid; that the alleged collection by Thompson for Dyer had been made, and that Thompson concealed the fact from Dyer after the collection. Thompson attempted on his trial to prove a *quantum meruit*. Under the circumstances the court excluded testimony of the value of his services, the purpose for which the documentary evidence alluded to was offered, but which was subsequently got before the jury in defendant's argument in his own behalf."

The transcript shows that the records in the suit of Dyer vs. Burdeau were offered in evidence on the trial of this case, were received without objection, "submitted to the jury, and filed in evidence."

The court, in its reasons, states that the record was offered to prove the value of defendant's services under a *quantum meruit*, and, further, that the defendant offered to read part of the record which had been excluded by the court.

The transcript distinctly shows that the whole record in the suits was offered and received in evidence, and was, therefore, before the jury. No objection seems to have been made to its introduction, and being thus in evidence, the accused was entitled to use, to refer to, or to read the whole or any part of it. Nothing appears in the transcript showing the exclusion of any portion of this record by the court. Indeed, the bill of exceptions signed by the judge recites that the "record and all of the papers of the suit of Dyer vs. Burdeau were offered in evidence." We think it was sufficient that the record was before the jury in evidence, no matter for what purpose, to entitle the accused to read it before the jury, and he could read the whole or any part of it, as he thought proper. The court gives as a reason for excluding the evidence that "it had been proved by credible testimony that the services of the defendant were engaged by Dr. Dyer for a stipulated sum, and that the sum had been paid," and that "Thompson attempted on his trial to prove a *quantum meruit*, and under the circumstances the court excluded testimony of the value of his services, the purpose for which the documentary evidence alluded to was offered."

Non constat that the accused might not have disproved that the alleged stipulated sum was not really stipulated, or that the sum was not paid, or that there was not a subsequent agreement by which he was entitled to an additional sum, or that he was to be paid a further sum, dependent upon the value of his services.

At any rate, for whatever purpose the accused desired to read the record in evidence, it being filed, and before the jury, he had the right

to read, and bring it, as he might think, more directly to their attention.

We think the court erred in refusing or restricting this clear right of the accused. For, whatever the evidence contained in the record was worth, the accused had the right to present it to the jury, who would have given it its proper weight.

It is therefore ordered, adjudged, and decreed that the verdict and sentence of the lower court be set aside, and the judgment therein be annulled, avoided, and reversed, and that this case be remanded to the court again to be proceeded with according to law.

No. 983.

WOOD & ROANE VS. THOMPSON WOOD.

It is not indispensable that the Petition of Appeal should contain a prayer for Citation on Appellee.

Acceptance of service of Citation of Appeal by Counsel will be presumed to be authorized by Appellee, until the contrary is shown according to law.

The right to file a Transcript of Appeal within the three judicial days following the fixed return-day, has become a rule of practice, acknowledged by the jurisprudence of the State, which this Court will not disturb.

It is not necessary that the original of the Petition of Appeal be annexed to the Transcript. A copy is sufficient.

The only question before this Court in an Appeal from an Order of seizure and sale is, whether there was legal and sufficient evidence before the Judge to justify his *fiat*. In such a case, the evidence being in the Record, no assignment of error is necessary.

Executory process cannot issue unless on authentic evidence of the debt and mortgage.

APPEAL from the Fourteenth Judicial District Court, parish of Ouachita. *Parsons*, J.

Franklin Garrett for Plaintiffs and Appellees:

First—Citation is a *sine qua non;* the evidence thereof is the sheriff's original return filed in the Supreme Court. If the law permits the counsel of an appellee resident to waive citation, the original waiver must be filed in the same court. Courts cannot presume so vital a fact. 13 An. 620.

Second—The "return-day" does not mean two days more, or three days. "Within the time" means to and inclusive of the fixed day, but not two days beyond it. 11 M. 433: 12 M. 505; 1 N. S. 573.

Third—The original petition of appeal "must" be filed in the Supreme Court—not a copy of it.

Fourth—Where appellant relies on an error on the face of the record, he must file a written assignment of the error, "otherwise his appeal shall be dismissed." 6 La. 143; 1 La. 52; 1 Rob. 460; 4 Rob. 147.

Fifth—The courts of Louisiana are courts of statutory law, and not de-

pendent on precedent for that law. Nothing is *stare decisis* in Louisiana but the statute, the law. Judges Martin and Bullard declare the true doctrine in 3 M. 52, and 14 L. 483: "It is the business of the legislature to make the law, and the duty of every court to pronounce it, as they find it."

Sixth—Because one judge (or a number of judges) has mistaken the law, furnishes no legal reason for another judge or judges to commit the same mistake, purposely, and without the excuse of want of knowledge of the true meaning of the plain text of the law.

Seventh—If the court construe rigidly the law against the appellee, with even-handed justice you must mete the same measure to appellant.

Cobb & Gunby for Defendant and Appellant:

First—Executory process cannot issue on a mortgage executed *sous seing privé*. C. P. 733.

Second—Executory process cannot issue in favor of the third holder of a mortgage note payable to the order of the mortgagee, unless there is authentic evidence of the indorsement. 24 An. 476.

Third—The third holder of a mortgage note payable to two mortgagees cannot proceed thereon unless the note is indorsed by both payees.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiffs and appellees have filed two distinct appearances, tending to a dismissal of the appeal.

In the first, they complain that they have not been cited according to law.

In the second, cautiously reserving all rights under the motion they say that the petition of appeal and transcript were not filed on the return-day appointed by law; that the petition of appeal is not annexed to the transcript, and was not filed in this Court as required by law; that the appellant has filed no assignment of error in this Court.

We propose to examine the first ground of complaint, for it is only on the theory that appellees are in court, by a proper citation, that they can be heard to urge the grounds embodied in their additional appearance.

The question is, therefore: Have the appellees been cited to answer the appeal?

The appeal was asked by petition, filed on the 13th of December, 1879, containing a distinct prayer that the plaintiffs be cited. This was unnecessary. 4 A. 434; 12 A. 332. See, also, Seghers vs. Soulé, N. R. O. B. New Orleans, 45 fol. 15; also, Vredenburg vs. Behan, lately decided; also Murphy vs. Factors' Co. N. R. (1876.)

On examining that petition, as found in the transcript, we find on it the following indorsement:

"Service accepted and citation of appeal waived this 15th day of December, 1879.

"FRANKLIN GARRETT,

"Attorney for Wood & Roane."

The validity of this indorsement was not admitted in the argument of the cause by the counsel whose act it purports to be.

The indorsement is found on the petition of appeal, filed on the 13th of December, 1879, and which is covered by the clerk's certificate, which appears to be in due form, at the end of the transcript.

We cannot assume that the indorsement was not genuine; the clerk, who is presumed to know the signature of attorneys practicing before the court, would not have accepted the document with a forged signature; the counsel, whose signature the indorsement purports to exhibit, would have loudly denounced it, and properly too. There was no want of authority on the part of the counsel to make that indorsement. Acceptance of service by an attorney of record will be presumed to have been authorized by his client, unless the latter, by his own *affidavit* or otherwise, shows that the attorney transcended his authority. 3 A. 258; 9 M. 88; 10 M. 639; 12 R. 95; 3 A. 558; 5 A. 118; 10 A. 66; 5 N. S. 343; 8 N. S. 2; 1 A. 397.

In the present instance the petition was signed by the counsel who represents the appellees in this Court. We are satisfied that there was an authorized waiver of service of both petition and citation, on behalf of the appellees, by their attorney of record, and that the motion to dismiss on the ground of want of citation is untenable.

Passing now to the other reasons asserted for the dismissal of the appeal, we hold:

First. That the appeal being made returnable on the second Monday of June, 1880, to this Court, at Monroe, which was the 14th of June, the transcript filed on the following day was in time. The right to file a transcript within the three judicial days following the fixed return-day seems to be impliedly accorded by law, and has almost invariably been so recognized. The jurisprudence on that point is so ancient, that it has become a rule of practice throughout the State, which, far from disturbing, we formally indorse. We deem it useless to refer to authorities, which are very numerous and admitted by counsel to exist.

Second. It was not necessary to annex the original of the petition to the transcript, or to file it in this Court. Copies have been held to be sufficient. 4 N. S.; 12 L. 465.

Third. It is not required in a case like that before the Court, in which *executory process* was asked and granted for the seizure and sale

of real estate to pay the debt claimed, that an assignment of error be filed.

The only question presented in such a case is: whether there was legal and sufficient evidence before the judge to justify his *fiat.* Where the evidence in a case is of record, no assignment of error is necessary on appeal. 6 R. 58; 26 A. 709.

The motions to dismiss are overruled.

ON THE MERITS.

We find that the evidence before the judge is an act under private signature, recorded in the office of the parish recorder; that the notes filed with the petition are countersigned by the deputy recorder, on the day of registry of the act, at the solitary instance of one of the subscribing witnesses.

An order for executory process cannot issue, unless on authentic evidence of the debt and mortgage.

C. P. 732 *et seq.;* H. D. p. 646, *vo.* Ex. Process, 1 (a) (b) p. 651, III. (a) L. D. p. 288, *vo.* Ex. Process, 1 II. III.

It is therefore ordered that judgment of the lower court be reversed, and that these proceedings be dismissed with costs.

ON APPLICATION FOR REHEARING.

The brief filed on behalf of plaintiffs, on this application, condenses the able argument of their counsel on the trial of the case. The spirit and the letter of the laws, the rulings bearing upon the questions presented, have been subjected to a severe criticism on his part.

Were the argument offered on questions never before agitated, the views urged might have received indorsement, but the subjects reviewed have so long ago, and so frequently since the beginning, been presented, thoroughly discussed, and so pointedly determined, that the rules which the previous Courts have recognized have settled the practice with such solidity that it would be dangerous, probably hurtful, to endeavor to shake them. It would even be useless to do so, as they are generally received, and have perhaps supplied deficiencies, which, otherwise, might be claimed to exist, to the mystification of both Bar and Bench.

Our attention was specially invited to 32 A. 29. That case has reference to an *extended* and not to an *original* return-day for the filing of the transcript. The authorities in the "report of the case," quoted by the appellee, and by the Court, are to the effect, that the appellant is not entitled in such *extension* case to the *three days of grace* allowed when the appeal is *first* made returnable.

The application for a rehearing is disallowed.

No. 971.

ROBERT E. BRANNIN VS. J. W. WOMBLE, SHERIFF, ET AL.

In a suit against husband and wife, in which he takes an Appeal, whether he is acting for himself individually, or as head and chief of the Community, or as legal agent of his wife, he can stand alone in judgment and his wife is not a necessary party to the Appeal.

When, at the time a special mortgage was granted on an undivided portion of a plantation, the mortgagor only owned the undivided portion mortgaged, the subsequent acquisition by him of the rest of the undivided property, will not render the said property subject to the exemption of the Homestead.

APPEAL from the Twelfth Judicial District Court, parish of Franklin. *Smith*, J.

A. W. Moore for Plaintiff and Appellee.

Boatner & Liddell for Defendant and Appellant:

First—That the act of mortgage bearing upon an incorporeal—an undivided interest in a plantation—bore upon a class of property not falling within the terms of the Homestead Act, and hence not subject to its provisions.

Second—That any change in the disposition or nature of the property mortgaged is inoperative as to us, and that we have the legal right to enforce the contract according to its terms. 14 An. 47.

The value of the property sought to be exempted is far in excess of the limit fixed in the exemption law.

The opinion of the Court was delivered by BERMUDEZ, C. J.

ON MOTION TO DISMISS.

Plaintiff moves to dismiss the appeal herein on the following grounds:

1st. The order of appeal is defective, in not stating in whose favor it is granted.

2d. The appeal-bond is signed by J. A. Morris, one of the defendants, and the name of Emily A. Morris, the other defendant, does not appear, either in the bond or in the order of appeal.

3d. The appeal-bond is not signed by Emily A. Morris, the other defendant, or any one representing her.

4th. As Emily A. Morris is not appellant, she is appellee, and, as such, has no interest in disturbing the judgment of the District Court.

5th. J. A. Morris can only prosecute the appeal, so far as his interest is involved, separate and disconnected from that of Emily A. Morris.

In order to test the strength of these objections, we are authorized to ascertain from the pleadings who are the parties to this litigation.

The petition avers that, under execution issued in the case of J. A. Morris and Emily A. Morris against R. E. Brannin, the sheriff has seized and is about to advertise and sell real estate which is the homestead of plaintiff; that an injunction is necessary to prevent such sale, and concludes by asking that relief, and that the sheriff and said parties be cited, and that finally the property be declared exempt as alleged.

The answer filed to this petition is made in the names of J. A. Morris and of Emily A. Morris, his wife. They aver how and why the property is not exempt, and pray that the injunction be dissolved.

The judgment perpetuates the injunction, and orders that "John A. Morris and his wife Emily A. Morris pay costs of suit and proceedings."

It is evident, therefore, that John A. Morris and Emily A. Morris are husband and wife, not separated in property, and that they are treated by Brannin as his judgment creditors.

Now, the amount for which judgment was rendered in their favor is due either to Morris individually, or to the community between them, or to Mrs. Morris. In either case, Morris had a right to stand in judgment alone, and his wife was an unnecessary party. The proposition is self-evident. C. P. 1; R. C. C. 2404; C. P. 107.

What then becomes of the objections upon which the motion to dismiss is founded? At one breath they vanish into thin air.

I. The motion is made in the name of defendants. This includes at least the real defendant. The appeal must always be considered to be granted to him who applies for it. It is not necessary that the name of the appellant should be mentioned in the order of appeal. If it were otherwise, the omission could not be attributable to the appellant, but to the Court, and the appellant could not be held responsible.

II. The bond of appeal embodies the name of J. A. Morris. It was not necessary that it should contain any other.

III. It is signed by J. A. Morris, the only real defendant. It is not required that it be signed even by him, still less by any other.

IV. Whether Mrs. Morris be appellant or appellee, is immaterial, as she is not a necessary party.

V. J. A. Morris claims, either for himself personally, for himself as head and master of the community, or for his wife as her legal agent. Morris having a standing in court to obtain judgment, has also a standing to remove impediments thrown in the way of recovery.

The motion is overruled.

ON THE MERITS.

On the 1st of May, 1874, Brannin borrowed $6207 from J. A. Morris

and Emily A. Morris, and secured payment by mortgage on his undivided three fourths of certain lands. On May 31, 1876, the matured debt remaining unpaid, suit was instituted *via ordinaria* to recover its amount, with mortgage. Upon averments, the defendant claimed that the property, being his homestead, was exempt from seizure. Judgment was rendered on the 9th of June, 1877, recognizing the money demand and mortgage claimed, but pretermitting the homestead question. Execution having issued on the 21st of May, 1878, the sheriff, on the 27th of May following, levied it on the undivided share mortgaged. On the 17th of December, 1877, Brannin had purchased the remaining undivided fourth, until then belonging to others.

On the 17th of August following, Brannin brought the present proceedings, averring the issuance and levy of the writ on said undivided three fourths, his acquisition of the last fourth, prior to the seizure, and, making required averments, showing that the property *then* exclusively his, is exempt from seizure as his homestead, he prays for an injunction to arrest the sale of it and for a judgment declaring the property free from liability for debt.

The answer in the abstract is, substantially, that the undivided portion seized is not exempt; that the *status* of such share at the date of the mortgage cannot be subsequently changed or affected by any act of the plaintiff, to the prejudice of the mortgage debt previously existing, without the participation of the creditor; that the property claimed as exempt exceeds $2000 in value, the upper limit fixed by law; that plaintiff is the owner of considerable movable property.

After trial of the issues presented, the property in question was declared to be the homestead of the plaintiff and so exempt from seizure, and the injunction issued was made perpetual, at defendants' costs.

The judgment thus rendered is now before us for review.

We consider the question to be: Has the undivided share which the plaintiff has hypothecated to secure the sum loaned him, and which was liable to seizure and sale at the time the contract was formed, ceased to be encumbered, and so responsible for the debt incurred, *because* the plaintiff has, since the mortgage was consented, acquired the remaining undivided portion belonging to others, thus becoming the sole owner of the whole property?

We will not inquire into the motives which induced the Legislature to adopt the Homestead Act, upon which the plaintiff places his case. It is a law of relief, which exists in almost every State of the Union, to the enforcement of which the courts will lend their aid, but in proper cases only. The reasons which animated that body on the occasion were inspired by considerations of public policy. It is sufficient that the power to pass it existed, and that it was exercised.

In order to appreciate this case intelligently, it is highly useful to consider and bear in mind the circumstances of fact and of law under which the contract was entered into in *1874*.

The Homestead Act at that time had been in force since 1865. It had been interpreted by the highest judicial State authority, and the construction put upon it had become part of the contract. It is elementary that the laws and their exposition, in force at the date of the formation of covenants, are to be considered as having been kept in view, as an important, a vital ingredient, by the contracting parties.

In Todd vs. Gordy, 28 A. 668, dealing with a question of homestead, under the act of 1865, the Court said, alluding to the debtor: "His creditors contract with him with reference to the character, value, and condition of his residence and adjoining land."

It would be cumbersome to transcribe here the Homestead Act. R. S. 1691, 1692.

On the first of May, when the contract was formed, that act had received a judicial interpretation.

In conformity with the established principles regulating the effects of exemption laws and of all laws for the benefit of debtors to the injury of creditors, the Court held that the act in question, being in derogation of common right, should be strictly construed.

Guillory vs. Deville, 21 A. 686, decided in 1869. This ruling was subsequently affirmed in 28 A. 667, at least.

The question afterward arising, in a case in which an undivided share in real estate had been mortgaged, whether such portion was exempt from seizure, under the Homestead Act, the Court held that it could not be comprised within the compass of that law, and could be subjected to the debt.

This doctrine was first announced in Henderson vs. Hoy, 26 A. 156, was affirmed in 28 A. 355, 608, and is a rule of property.

The act under consideration might have been framed with more perspicuity, but its obscurity is not dangerous to those concerned, and does not prevent it from being well understood.

It was not every one who could claim the benefit of the law; it was not every property that could be brought within its pale. The claimant was required to be the owner of the property, to occupy it as his residence, to derive support from it, to have person or persons dependent upon him for maintenance; the property was not to exceed $2000 in value; the claimant's wife was not to own or be in actual enjoyment of property, in her own right, exceeding in value $1000. Unless all these elements concurred, the claim for exemption was to be without foundation. As was well observed by the counsel of plaintiff in his learned brief: "When all these conditions and pre-requisites cumulate in one

person and show the existence of a state of facts contemplated by the legislature in the enactment of the exemption law, then, he can, with confidence, claim the benefit of the law."

Such was not the condition of things at the date of the contract under consideration.

The plaintiff was not in 1874 the sole owner of the property described in his petition. He owned three undivided fourths thereof, and mortgaged that share, which was then liable to seizure, for the debt. When the sum was borrowed, it is legitimate to suppose that the plaintiff induced the lender to part with his money on the representation that an undivided share in real estate had just been held by the highest judicial authority not susceptible of being claimed as exempt from seizure under the Homestead Act, and that, trusting and yielding to that consideration, the lender made the investment, deeming it safe and well protected.

There was then a contract legally formed, the specific performance of which was to be the re-imbursement of the money, by seizure and sale of that undivided and unprivileged share if necessary. Under this agreement, rights were created, acquired, and vested, and obligations were incurred; R. C. C. 1757, 3278, 3282; obligations which no State, not even in convention assembled, could impair or divest in the least degree, without a flagrant violation of the paramount laws of the land, which no court could sanction.

How can it be, with the least plausibility, advanced, as a sound proposition of law, that the debtor could, by any subsequent act of his, affect obligations which the State itself, in the utmost exercise of its powers, could not validly alter to his advantage and to the injury of his creditors?

How can it be pretended that the State has delegated to one of its citizens the right of derogating from the obligations of his contract, when the State itself was powerless to do so?

It can well be said, nevertheless, that when the parties contracted they did so subject to the contingency that might arise in the future, rendering it advantageous for the debtor to avail himself of the benefit of the homestead law. This theory was recognized in 26 A. 149, but with this remarkable difference, however, that the Court assumed to make it a *necessity* for the debtor to assert immunity under the act.

Where a party lends money to one who is the owner of rural property, taking a mortgage on the land, when the owner does not occupy the property as his residence, does not derive support from it, has no one dependent upon him for maintenance, and is unmarried, such lender makes the loan and accepts the mortgage subject to the contingencies that the debtor may bring the property within the meaning and purport

of the act, by occupying it as his residence, by deriving support from it, by having some one dependent on him for maintenance, by marrying a person destitute of means. He "takes his chances," as is said in common parlance.

It was from that stand-point that in Fuqua vs. Chaffe, 26 An. 148, so confidently relied upon by the plaintiff, the Court held that the property in that case could be exempted under the homestead law. It was not the residence of the debtor at the time the mortgage was placed upon it. It became so afterward, prior to seizure.

A similar consideration has influenced the Court in all the cases *in pari materiâ* in which widows, with and without minor issue, left in necessitous circumstances, claimed the one thousand dollars allowed by law to surviving consorts in penury.

In the Succession of Marc, 29 A. 415, which goes to the furthest limit, the Court held: That the surviving widow, although a former concubine, and only married a few days before her husband's death, is entitled to all the rights enjoyed by any other widow under the homestead law, and so would rank, and thus practically exclude altogether, in that insolvent estate, a mere mortgage creditor, however ancient, who had contracted with the mortgagor when he was a bachelor, and could not be, owing to his advanced age, suspected of bosoming the remotest aspiration after the felicity which usually proves consequent upon connubial life.

We are at a loss to perceive how the theory established in 26 A. 148 can be invoked as authority for the determination of the issue now before us. The disparity between the two cases is glaring. The fallacy consists in viewing them as being similar in all material elements.

In that case, when the mortgage was consented the debtor *was the sole owner* of the land upon which a claim of exemption, under the homestead law, was predicated. In the present instance, he was *not the sole owner* of the property upon which the claim is now sought to be located.

The debtor, in such a case as is now presented to us, had agreed to a mortgage which attached to a thing upon which a homestead claim could no more be made at the time than it could be asserted had he hypothecated a ship or other vessel, which is mortgageable under our system, according to the usages of commerce.

R. C. C. 3289, 3305.

In 6 La. 214, an undivided portion of real estate having been mortgaged and the property subsequently amicably partitioned, the Court properly held: That this could not affect the right of the mortgagee, who could proceed to enforce his claim, regardless of the partition. 14 A. 47. This doctrine was indorsed in 25 A. 397, and 31 A. 393. It

would seem to flow from this theory, that if the mortgagor cannot impair the rights of the mortgagee, even by compelling him to resort to a different remedy proceeding, he can still less destroy his claim to a mortgage by asserting rights to exemption under the homestead act arising from the subsequent acquisition of the undivided portion previously belonging to others.

The conventional mortgage on the undivided three fourths could not, under any circumstance, by its own force and virtue extend to the last fourth, when purchased; how could, then, this last fourth, when acquired, and because acquired and added to the three undivided fourths and forming a unit, annihilate the mortgage on those three undivided fourths?

Further discussion of the subject is unnecessary. Strictly, the mere statement of the proposition upon which this case is based carries its own refutation.

We, therefore, hold the negative of the question, and declare that the character or *status* of the undivided share mortgaged has not changed by the acquisition on the part of the plaintiff of the remaining fourth.

In ruling as we do, we have the satisfaction of feeling that we have based our judgment on the moral maxim of the law, that no one ought to enrich himself gratuitously at the expense of another. R. C. C. 1965.

The views which we have expressed dispense us from passing on the alternative defenses set up to the action.

We cannot dissolve the injunction with damages, as we do not think that this is a case in which any should be allowed. The plaintiff does not appear to have acted rashly. His views were indorsed by the lower court; interest accrues on the claim; under the mortgage-act the fees of the attorney employed to foreclose the mortgage are to be paid by the debtor; the costs of the litigation, from the beginning, will have to be borne by the plaintiff in this case, and will be onerous.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be reversed; and, proceeding to render such judgment as should have been rendered,

It is ordered, adjudged, and decreed that the demand of plaintiff be rejected, with judgment in favor of defendants; that the injunction issued be dissolved; that the writ arrested be proceeded with, and that the three undivided fourths of the real estate described in the petition and act in the suit wherein execution issued, be seized and sold in satisfaction of the claim liquidated in said case, and that plaintiff in this case pay costs in both courts.

Messrs. Justices Todd and Levy dissent from this opinion and decree, on the merits, and reserve the right to give their reasons hereafter.

No. 967.

STATE OF LOUISIANA VS. M. DAVID JOHNS.

An Indictment is defective for duplicity and uncertainty and will be quashed, when, in one and the same Count, the accused is charged with the two distinct offenses, defined respectively in sections 791 and 794 of the Revised Statutes, to wit: that of stabbing any person with intent to commit murder, and that of inflicting with a dangerous weapon a wound less than mayhem.

APPEAL from the Sixth Judicial District Court, parish of West Carroll. *Brigham*, J.

D. J. Norwood, Ed. F. Newman, District Attorney of the Sixth District, and F. G. Hudson, District Attorney of the Fifth District, for the State, Appellee.

David Todd and Richardson, McEnery & Polk for Defendant and Appellant.

The opinion of the Court was delivered by

LEVY, J. M. David Johns was prosecuted under information filed by the District Attorney in the Sixth Judicial District Court for the parish of West Carroll, in which he is charged with assault with a dangerous weapon and with stabbing one Levi C. Massingill with a dangerous weapon, with intent to commit murder, and with inflicting upon the said Massingill with said dangerous weapon a wound less than mayhem. The accused pleaded not guilty, and was tried by jury; the jury rendered a verdict of guilty, and the accused was sentenced by the court to ten years imprisonment at hard labor in the State Penitentiary. Motions for new trial and in arrest of judgment were made and denied, and the accused has appealed.

The first and salient objection urged by the defendant, and on which he asks a reversal of the judgment of the lower court, is, that the information under which the conviction and sentence were had is defective because of an illegal joinder of offenses therein. The information sets forth and charges as follows: That the prisoner, M. David Johns, "did willfully, maliciously, feloniously, and of his malice aforethought, stab one Levi C. Massingill, then and there in the peace of the State of Louisiana, with a pocket-knife, the said pocket-knife being then and there in the hands of the said M. David Johns, and the said pocket-knife being then and there a dangerous weapon, with intent to commit the crime of murder. And the said M. David Johns, at the said time and place, with the said dangerous weapon, to wit, a pocket-knife, did then and there feloniously, maliciously, and of malice aforethought, inflict upon the body of

the said Levi C. Massingill, then and there being in the peace of the State of Louisiana as aforesaid, a wound less than mayhem, contrary to the form of the statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same."

The crime of stabbing any person with a dangerous weapon with intent to commit murder is denounced in section 791, Revised Statutes of Louisiana, and that of inflicting a wound less than mayhem upon another person with a dangerous weapon in section 794. The crimes are separate and distinct, and different penalties attached to the several offenses. Being of the same generic class, and growing out of and connected with the same alleged act, it was doubtless competent to join these offenses in the same indictment, but the text-books and decisions of our own Court are clear that they cannot be joined in the same count. In this case the indictment contains but one count, and it cannot be successfully contended that the offenses charged are cumulative offenses denounced in the same statute. State vs. Markham, 15 An. 498, and authorities therein cited. In the case of State vs. Fant, 2 A. 837, the Court held that where the offense charged is cumulative "a general verdict of guilty in such an indictment would be sustained by proof of any one of the acts charged;" and in State vs. Banton, 4 A. 32, that "the general rule is, that several distinct offenses cannot be included in one count of an indictment; it is subject, however, to numerous exceptions. The rule appears to be well established, in relation to penal statutes, that when the statute enumerates several offenses connected with the same transaction, or the intent necessary to constitute such offenses disjunctively, they may all be alleged cumulatively in one count, and in that event must be charged in the indictment conjunctively." In State vs. Ford, 30 A. 311, it is well settled that only one substantive charge can be laid in each count. Thus it has been held, where an indictment containing one count charges the defendant with rude behavior in a meeting-house, and with disturbing public worship, these two distinct offenses joined in the same count were fatal to the indictment. 2 Mass. 163. "Two distinct offenses, requiring different punishments, cannot be charged in the same count. Such an indictment is defective for duplicity, and a conviction upon it will be reversed for error." 1 Parker's Crim. Rep. 481.

The duplicity and uncertainty which characterize the indictment in this case are to our minds manifest. It may well be asked, where the two offenses, one of stabbing with intent to commit murder, and the other inflicting a wound less than mayhem, are charged in the same count, and a general verdict of guilty is rendered, for which of these crimes did the jury find the prisoner guilty? And as one section of the statute denounced a certain offense and a certain penalty, and the other

section another offense and a different penalty, under which section is the penalty applied? The elementary principle in criminal practice and pleading, that all offenses shall be stated and charged unmistakably and with certainty, and the penalty for their violation plainly expressed, so that the accused may be thoroughly and distinctly informed and advised why and to what extent he is in jeopardy, should be rigidly adhered to, and its violation or a deviation therefrom would involve the upheaval of our settled criminal jurisprudence.

As the indictment is held by us to be defective, as above stated, and as these defects are fatal, it is not necessary to consider the other objections and pass upon the other questions presented in the brief of counsel of the accused.

For these reasons, and adopting the precedents of this Court in case of State vs. Palmer, recently decided by this Court, and State vs. Curtis, 30 An. 814, State vs. Morrison, 817,

It is therefore ordered, adjudged, and decreed that the verdict of the jury be set aside, and the judgment and sentence of the court be annulled, avoided, and reversed, and that the information under which the accused was prosecuted be quashed, and that M. David Johns be detained in custody to await the further action of the District Attorney and the grand jury of the parish of West Carroll, and until discharged in the due course of law.

No. 978.

STATE OF LOUISIANA EX REL. J. M. CIENTAT VS. THE JUDGE OF THE TWENTY-FOURTH JUDICIAL DISTRICT COURT.

There is no doubt that a District Court, after improvidently granting a Suspensive Appeal, where none should have been granted, may rescind the Order and issue Execution on the judgment appealed from.

From the rescinding action of the Court below, the Execution debtor would be entitled to relief in this Court by Appeal; and upon refusal of such Appeal, he would be entitled to a Mandamus and Prohibition.

His proper remedy, in such cases, is by Injunction.

But he is not entitled, in an original application for relief in this Court, to the Writ of Prohibition to arrest an Execution said to have been illegally issued.

APPLICATION for Writ of Prohibition.

Branch K. Miller for Relator.
John S. Tully and Sambola & Ducros for Defendant.

The opinion of the Court was delivered by

State ex rel. Cientat vs. Judge Twenty-Fourth Judicial District Court.

BERMUDEZ, C. J. The relator applies for a prohibition to prevent the defendant judge from executing against him a judgment rendered by the court over which the defendant presides.

His grounds of complaint are:

That a judgment having been so rendered against him, he took a suspensive appeal from it, furnishing a proper bond and surety therein, returnable to this Court, in New Orleans, on the first Monday in November next, and that since the appeal was taken and perfected, execution has issued against him for the satisfaction of the judgment complained of, and that, unless a prohibition issue to the District Court to prevent further proceedings, he will sustain irreparable injury.

It appears from the face of the proceedings that the judgment was rendered on the 3d of April, 1880, and that the order for a suspensive appeal was made on the 31st May following, more than ten days, it is claimed by the appellee, a defendant herein, after the adjournment.

The first question which presents itself is one of jurisdiction.

The petition for relief does not affirmatively show that the matter in dispute in the case in which the judgment appealed from was rendered exceeds one thousand dollars, exclusive of interest.

It is true that the District Judge made the order of appeal on a petition which declares that the matter in dispute exceeds the amount required by the Constitution to give this Court jurisdiction; but that petition does not state that this amount was that claimed in the suit in which the judgment appealed from was rendered. The relator was condemned as surety on an injunction bond. It may well be that he considers that it is sufficient to vest this Court with jurisdiction over his cause of complaint that the bond, which may be for less than one thousand dollars, was furnished in a case in which the amount in dispute exceeds one thousand dollars, exclusive of interest. In this he would be gravely mistaken. The insufficiency of the averment necessary to show *prima facie* that we have jurisdiction would have justified us in withholding the restraining order asked, though we might have granted a *rule* to show cause, which would have proved a lame relief, under the circumstances, for the question of the immediate issuance of the restraining order is one of vital importance to the relator.

Unwilling, however, to decline the application on that ground, which may be deemed too technical, and assuming that the case in which the judgment complained of was rendered is one in which the matter in dispute exceeds one thousand dollars, the next question presented is, whether we can determine, in the form presented, the character of the appeal granted the relator.

The rule is well established that when an order of appeal, particularly a suspensive appeal, is made, and the required bond has been fur-

nished by the appellant, the lower court ceases to have any further control over the case, the moment that the appeal is perfected, save to test the sufficiency of the bond and of the surety. The case passes from the court of first instance to the appellate court, and the first court must transmit the transcript to the latter court, that the judgment may be reviewed. 10 R. 152, 8 A. 434, 17 A. 186, 21 A. 44, 114, 24 A. 600, 27 A. 684, C. P. 575, 4 L. 205, 7 L. 448, 15 L. 391, 13 L. 574, 1 R. 527.

Whether a court of original jurisdiction, after granting a suspensive appeal, when none should have been allowed, either because the delay within which it should have been asked has elapsed, or because the case is unappealable, can recognize its error, rescind its order, and prevent execution to issue, is a question that should present no difficulty.

It cannot be claimed with any plausibility, that an *ex parte* order of this description, improvidently made, can defeat for any time the right of the judgment creditor to an execution in satisfaction of his liquidated demand. 4 A. 3; 5 A. 366, 518; 12 A. 175; 21 A. 44, 114, 55.

The appellant, in case of error by the lower court, which must *primarily* determine the question, would be entitled to relief in this Court in a proper case and proceeding, when the matter falls within our jurisdiction. 21 A. 114, 44. The case before us is not an appeal, but an original application for relief. The last question presented is whether the relator has placed himself in a condition to claim relief at our hands.

His petition does not set forth with sufficient fullness the circumstances in which he may be placed, and which if expressed might entitle him to protection. The Court cannot supply the deficiency caused by unaverred facts.

He does not aver that the District Judge has rescinded the order made by him for a suspensive appeal and directed execution to issue, which may be the case either because the appeal was asked too late, or because the case is not appealable, or because the bond is not sufficient, or because the surety was not good and solvent as the law requires.

Had the judge so acted and the relator felt aggrieved, his remedy would have been a suspensive appeal from the rescinding order, and in case of a refusal on the part of the judge to grant the same, the relator could have asked us for a *mandamus* coupled with a prohibition, on a proper showing. 21 A. 114, 44; Vredenburg vs. Behan et al., 32 A.

In the absence of any averment of the kind, we are left to infer that the execution alleged was issued by the clerk at the instance of the judgment creditor.

In such a case the relator would be entitled to an injunction on proper grounds to arrest the process. His right would be to apply for it to the District Judge, but he does not allege that he has taken any such steps before the lower court, and that any petition of the sort was

declined, and that in consequence he will suffer injury from the execution of the writ charged with having been illegally issued. He asks us to exercise an *original* jurisdiction which we have not, and which pertains exclusively to the lower court, that is, to arrest an execution said to have been illegally issued. His remedy is to apply to that court for an injunction. 21 A. 114, 44; 12 A. 175; 5 A. 366.

Were the lower court, on a proper application, to refuse such injunction, the relator would not be left remediless, but it cannot be expected that we should intimate the mode of relief.

The views expressed in this opinion will, we trust, harmonize the scattered and apparently contradictory jurisprudence of the State on the questions now decided.

It is ordered that the application for a prohibition be refused at relator's cost.

No. 982.

F. P. STUBBS VS. J. E. MCGUIRE, SHERIFF, ETC.

This Court has no jurisdiction of a case in which the constitutionality or legality of a tax of $5, is not in question, but only the legality of the *mode of payment* of said tax.

APPEAL from the Third Ward Magistrate's Court, parish of Ouachita. *Trousdale*, J.

Stubbs & Stillman for Plaintiff and Appellee:

First—The present license law repeals all parts of former license laws which provide for the seizure and sale of property to enforce payment of licenses.

Second—There is no law now in force which authorizes such seizure and sale.

Third—If there is such a law, article 210 of the Constitution prohibits such seizure and sale until the expiration of the year 1880.

Fourth—Warrants for the salaries of constitutional officers are receivable for licenses for the year in which the salaries are earned.

F. G. Hudson, District Attorney, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant, who is sheriff of the parish of Ouachita, and *ex officio* tax-collector for the State and parish, having given plaintiff, who is a licensed and practicing attorney, residing in said parish, a notice requiring him to pay him fifty dollars in lawful money

for his license for the year 1880, due the State for the practice of his profession, the plaintiff tendered him in payment a warrant for fifty dollars, duly issued to a constitutional officer for part of his salary for the same year, contending that under act 48 of 1877 such warrant is so receivable. The sheriff declined to settle in that mode, considering that it is made by law his duty to receive nothing but lawful money in satisfaction of such claim.

Complaining that the sheriff and *ex officio* State and parish tax-collector threatens and is about to resort to summary means of coercion, which would illegally interfere with and prevent the further conduct of his business, the plaintiff obtained, on showing, from a justice of the peace in the city of Monroe a preliminary injunction against the sheriff and tax-collector. After issue joined and trial, judgment was rendered perpetuating the injunction and condemning the defendant to receive said warrant in payment of said license.

From the judgment so rendered the defendant has appealed.

The question which presents itself, at the threshold of this litigation, in this Court, is one of jurisdiction.

The Constitution of 1879, article 81, extends the jurisdiction of this Court, among other instances, "to all cases in which the *constitutionality or legality of a tax* shall be in contestation, whatever may be the amount thereof." * * * *

The constitutionality or the legality of the *license* in the case before us, if it be a *tax*, is not *at all* contested. On the contrary, the plaintiff in injunction avers that he has offered *to pay* the license.

We have read attentively the able and interesting brief of the District Attorney on this subject of jurisdiction, but, while we give full credit to the ingenuity which it displays, we cannot concur in its conclusions, so as to construe the constitutional article to mean, unqualifiedly, that our jurisdiction extends to "all cases in which the constitutionality of any tax-law, or impost-law, whatever, is in contestation, and to all cases in which the legality of any tax, toll, or impost, *as demanded of the tax-payer, is in contestation*, whatever may be the amount thereof."

It is true that there is a difference between the article under consideration and that which existed on the same subject matter in the former Constitution. That difference consists in the enlargement of the powers of revision of this Court of a judgment in a case in which the constitutionality or legality of a tax is involved, by permitting the Court to consider both the *law and the facts* of the case. The change may have been made to cover the ruling in 27 A. 722, in which the Court held that the Court would not pass upon the facts in a case in which the validity of a tax was agitated. Be that so; but, from this circumstance, it cannot be inferred that the jurisdiction of this Court was ex-

tended beyond the power to pass upon the legality or constitutionality of the *tax* in contestation. It merely authorizes the Court to consider whether, under the law and the facts, the tax is or not constitutional or legal. We must, without further light, treat the ruling in 21 A. 751 as made in a case within the ordinary appellate jurisdiction of the Court, in point of amount and otherwise.

The difficulty which arises is as to the *mode* in which license *may* or *must* be paid.

We are at a loss to see how, even if we had jurisdiction over the case, a decision merely on the *mode* of payment could assist in determining the constitutionality or legality of the license, in a case in which such constitutionality or legality does not occur, but, on the contrary, is admitted. We consider that we have no jurisdiction over the case.

It is therefore ordered that the appeal herein be dismissed, and the case stricken from the docket of this Court.

No. 977.

STATE OF LOUISIANA VS. GREEN RED, ALIAS GREEN REDDING.

Act No. 7 of the Legislature of 1880, providing for the fixing of the first terms of the District Courts under the Constitution of 1879, construed as suspending, for those terms of Court the operation of that part of Act No. 44 of 1877, which required the drawing of the jury fifty days before the session of the Court.

This Court cannot take cognizance of objections urged by the Appellant for the reversal of the verdict of the jury and judgment of the Court below, unless those objections have been incorporated in a Bill of Exceptions, which must be precise and explicit, and not to be aided by inferences, in default of which the presumption is that no error has been committed.

APPEAL from the Fifth Judicial District Court, parish of Ouachita. *Richardson*, J.

F. G. Hudson, District Attorney, for the State, Appellee.

J. T. Strother for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Green Red, who has been indicted, convicted on a charge of murder, and sentenced to death, seeks on appeal to reverse the verdict of the jury and the judgment of the lower court, on the following grounds:

First. That the grand jury which found the indictment, and the petit jury which tried the case, were taken from a venire drawn in less than fifty days before the session of the court at which the accused was indicted and tried, as required by Act No. 44 of 1877.

Second. That the judge of the lower court erred in ordering talesmen jurors to be summoned for the trial of the cause, for the reason that twelve jurors of the regular venire, empaneled to try another case, were in an adjoining room deliberating on a verdict, and that, therefore, the panel was not exhausted so as to justify the summoning of talesmen.

Third. That the accused objected to the introduction in evidence of his voluntary declaration made before, and taken down in writing by, the parish judge, acting as committing magistrate, because the document did not show affirmatively by the certificate of the magistrate that the accused had made his declaration without threats of punishment, hope of reward, or other improper inducements.

1. The accused urged his objection to the manner of drawing the jury by a motion to quash the indictment, and by a challenge to the array. The venire shows that the jury was drawn by virtue of, and in obedience to, Act No. 7 of the Legislature, approved February 20th, 1880, which provides for a term of the District Court for the parish of Ouachita, to be held on the first Monday of April of this year, and requires that it shall be a jury term; it further requires that a jury be drawn for that term, according to existing laws.

Now, as Act No. 44 of 1877 was the only law then existing directing the mode of drawing juries in the State, and because that act requires the performance of that duty at least fifty days before the next term of the District Court, counsel for accused contends that the jury, in this case drawn on the 27th of March, for a term of the court, and to begin on the 5th of April following, was illegal and null, as the drawing thereof was in violation of that provision of Act No. 44 of 1877.

The Legislature, in enacting a law on the 20th of February, ordering terms of court to be held in certain parishes in this State on the first Monday of April following, knew that its act could become operative in any and all of these parishes only twenty days after promulgation, and that no drawing of juries thereunder could take place fifty days before the session of such courts, and yet the act positively orders the drawing of juries for all such terms of court.

We cannot adopt an interpretation or construction of the law which places the Legislature in an attitude of stultifying itself by requiring the performance of acts rendered impossible by the very nature of things.

Such a construction is repugnant to all precedents, and condemned

by our jurisprudence, which discountenances an interpretation which would defeat the object of a statute.

The evident object of this statute was to establish terms of the District Courts in the State, to begin with a jury term for certain parishes on the first Monday of April of this year.

The interpretation contended for by counsel for the accused would have defeated that object of the statute which required a jury term of the District Court in Ouachita parish on the first of April last.

We are, therefore, compelled to conclude that the Legislature intended for those jury terms of court to suspend the operation of that part of the act of 1877 which required the drawing of the jury fifty days before the session of the court.

If any doubt could remain on the mind, it is easily dispelled by a mere reference to the repealing clause of the act, which repeals all acts in conflict therewith. The objection to the legality of the jury is, therefore, untenable, and we rule that the jury was legally drawn in compliance with Act No. 7 of 1880.

The other two grounds of error are incorporated in a document purporting to be a bill of exceptions, which is signed by the District Judge, in which it is related that counsel for the accused objected to the swearing in of talesmen as jurors, on the ground that the panel was not exhausted, and that there were other jurors of the regular venire deliberating on a verdict in another cause.

It is further related in that document that the accused objected to the introduction as evidence of his voluntary declaration taken before the parish judge, because the certificate of that officer failed to show that no threats, promises, or other inducements were used to draw out the declaration.

But nothing in the instrument or in the record informs us whether the objections of the accused were sustained or overruled by the judge; neither does the document contain any of the reasons given by the judge for his ruling, as it may have been.

And, besides, the voluntary declaration objected to was not attached to the document styled a bill of exceptions, and is not even to be found in the transcript.

For all of which reasons we can take no cognizance of the objection urged by the accused in this form, which objections should have been incorporated in a bill of exceptions, which must be precise and explicit, not to be aided by inference, in default of which the presumption is that no error has been committed. We see no error in the proceedings, and we shall not disturb the verdict of the jury and the sentence of the court.

It is therefore ordered, adjudged, and decreed that the verdict of

the jury be maintained, and that the judgment of the lower court be affirmed.

CONCURRING OPINION.

TODD, J. I concur in the decree just rendered; but I think that the objections made to the bill of exceptions taken to the ruling of the judge *a quo* touching the talesmen jurors are not tenable. The very fact that such bill was presented and signed is conclusive to my mind that the ruling of the judge was adverse to the accused. The consent of the opposite counsel must be presumed, considering the silence of the bill as to any objection made by them, and the fact to be presumed, that the bill was read and signed in their presence and in open court. I think, too, that it is sufficient that the bill should show the objections made to the motion filed, and that the judge can, if he chooses, add the reasons for his ruling, but that it is not *sacramental* that the reasons for the ruling should appear in the body of the bill, where the objections are distinctly set forth. I concur in the opinion as to that part of the bill that relates to the voluntary declaration of the accused on his preliminary examination, and I concur in the decree because I think there was no force in the objections made touching the empaneling of the talesmen jurors.

No. 980.

W. J. Q. BAKER VS. HENRY FRELLSEN. W. J. Q. BAKER VS. T. P. RICHARDSON, SHERIFF, ET AL. CONSOLIDATED.

A Motion to dismiss the Appeal will be denied when the reasons urged by Appellee require an investigation into the facts and merits of the case.

A compromise between creditor and debtor, by which the amount of the debt, the terms and mode of payment, the rate of interest and the nature of the securities are changed, does not effect a *novation*, unless the intention of the parties to novate the obligation is particularly expressed.

The surety on an Injunction bond is discharged by an agreement entered into, without his consent, by the Plaintiff and Defendant, to have the case tried at chambers and decided after Court term.

Judgment on the Exception of No cause of action, when it maintains the Exception, constitutes *Res judicata* as effectually as if rendered on the merits of the case.

APPEAL from the Fifth Judicial District Court, parish of Ouachita. *F. P. Stubbs*, Special Judge.

W. J. Q. Baker, *propria persona*, and John T. Ludeling for Plaintiff and Appellee:

The parties, by their Compromise, have novated the original debt, and the vendor's privilege, which secured it, was not transferred to the new debt. Jacobs' Law Dictionary, vol. 4, p. 279. C. C. 2189 *et seq.* Pothier, vol. 1, p. 433, No. 546 *et seq.* Domat, 2305.

Plaintiff is entitled by law to his homestead. 28 An. 333.

Boatner & Liddell for Defendant and Appellant:

First—When it appears that the husband and wife in a former injunction, decided adversely to them, each claimed the homestead, the plea of *res adjudicata* will be maintained when the husband alone, in a second injunction, issued on the same judgment, again claims a homestead on the identical land. 9 An. 208; 12 An. 613 and 199; 30 An. 230, 441; 5 La. 244.

Second—In a suit to annul a judgment from which an appeal has been taken on the ground of error and fraud, patent in the record, the plea of *lis pendens* will be maintained against the suit to annul when the petition in the suit to annul sets forth the same grounds as the petition of appeal. The remedy is by appeal. 30 An. 793; 23 An. 147; 9 An. 197, 428; 17 An. 726.

Third—In order to annul a judgment for fraud, the evidence must be clear and positive. 11 La. 139.

Fourth—When it appears that the debt, the basis of the judgment, is for the purchase price of the property, and when that debt is secured by mortgage retained in the notarial deed to secure the vendor, or any *bona fide* owner of said notes, the judgment of the court may properly decree the recognition and enforcement of the special mortgage and vendor's privilege, unless it is specifically renounced.

Fifth—The renunciation of the vendor's privilege will not be presumed; its renunciation must be clear and explicit.

Sixth—Though the vendor's privilege do not exist, yet if it appear that the debt for which the property is pursued is for the purchase price thereof, the debtor cannot maintain a homestead on the property. 28 An. 415, 183.

Seventh—Novation is not presumed; the intention to novate must be clearly deducible from the terms of the agreement.

Eighth—When a debt is merely divided into installments and the interest thereon reduced, there is no novation.

Ninth—The testimony of the attorney who drew up the judgment is properly admissible to disprove an allegation of fraudulent intent in writing up said judgment.

Tenth—One pursued by the innocent third holder of notes representing the purchase price of a piece of property will not be allowed to

introduce evidence to destroy the title of his vendor and his own in order to defeat said claim. C. C. 2185-7-9-90; Pothier (559); 3 An. 600; 4 An. 281; 9 An. 228; 29 An. 841; 26 An. 691; 13 An. 549; 10 Rob. 418.

Eleventh—When an injunction is manifestly taken without good ground, and for the purpose of delay, it will be dissolved with damages.

Twelfth—When the parties to a suit enter into a written agreement that the judge shall decide the case in chambers and file his judgment in the clerk's office, and said agreement is spread on the minutes of the court, a judgment rendered in accordance therewith, as between the parties, will be valid.

Thirteenth—Where a judgment contains a stay of execution, the judgment debtor is in default by the terms of the contract if he fails to pay the installment according to the terms of the judgment.

Fourteenth—It is not to be presumed that a clerk would issue an execution except when legally authorized to do so.

Fifteenth—The judgment debtor who enjoins the execution upon the ground that it issued prematurely must allege and prove the facts necessary to sustain his defense.

The opinion of the Court on the Motion to Dismiss was delivered by BERMUDEZ, C. J.

The opinion of the Court on the Merits was delivered by LEVY, J.

The opinion of the Court on the Application for Rehearing was delivered by BERMUDEZ, C. J.

ON MOTION TO DISMISS.

BERMUDEZ, C. J. The plaintiff, Baker, having, in aid of a suit previously instituted, obtained an injunction to arrest a suit against him, furnished the bond required, with John T. Ludeling as surety therein.

Parties plaintiff and defendant being desirous of having the suit determined, agreed that it could be heard and decided, *at chambers*, after the adjournment of the court and term time.

The document signed to that effect was noted on the minutes. It was not signed by the surety on the bond for the injunction.

In furtherance of the agreement, the case was taken up, decided, and the judgment was signed by a judge *ad hoc* at chambers, without any knowledge or participation on the part of the surety.

The judgment was, that the injunction be dissolved without damages. From this judgment an appeal was taken by petition, and citation was served on the surety on the injunction bond. He now moves this Court to dismiss the appeal, because he was no party to the consent that the

case be tried *at chambers*, and is not bound by the judgment so rendered.

Of whatever relief the irregularities charged may be to the surety, they cannot be inquired into on a motion to dismiss, as they necessitate an investigation into the facts of the case as presented by the appeal. The validity of those objections will be tested and passed upon when the merits of the case will be considered and determined.

Motion overruled.

ON THE MERITS.

LEVY, J. These two suits are consolidated, and the issues involved are, in the main, common to both.

In suit, 1415, vs. Frellsen, the plaintiff alleges that in the judgment rendered in suit No. 1281 (Nos. 1219 and 1358 being consolidated therewith) the following words were fraudulently interpolated and interjected, with the intention to defraud and damage him, and he prays that said judgment be amended and set aside on account of error and fraud, and that the execution issued thereon be quashed.

In suit No. 1416, plaintiff averred that suits No. 1219 and 1358 had been merged in suit No. 1281, and that the judgments therein and the debts mentioned in them had been novated. He further avers that the mortgage recognized in the judgment in No. 1281 is the only security which the judgment creditor has for the payment of the debt created by the agreement entered into between him and Frellsen, said creditor, on the 6th of January, 1877; that "through error and fraud" the words "and vendor's privilege" were incorporated and interpolated in said judgment in suit No. 1281; that if the debt, created by the agreement, is not a new debt, it is usurious, because to make it up all the interest of the old debt to the first of January, 1877, was added to the principal to make the aggregate of the new debt, and therefore the interest is usurious: that he has not been put in default. He further alleges that he has already instituted an action to annul said judgment, and that he is entitled to a homestead on 160 acres of the plantation, to include his residence, and that no vendor's privilege or debt due for the price of said property exists thereon. He prayed for an injunction restraining the sheriff from proceeding further with the execution and with sale of the property, and that the judgment in suit No. 1281 be annulled for error and fraud.

We had intended to discuss at some length the various questions raised by the plaintiff and involved in this case, but a reference to the record, in which we find the able and lucid opinion and reasons for judgment of the special judge by whom this case was tried in the lower court, dispenses us therefrom. In that opinion he says: "I am inclined

to think that the plea of *res adjudicata* of defendant is good as to all the allegations and issues except those upon which the nullity is demanded, but prefer to examine the case on its merits as presented. Plaintiff's theory is that only the vendor's lien can defeat this claim to a homestead. That though he purchased the property from Pargoud and gave a special mortgage to secure the payment of the price, a part of which was evidenced by the notes held by Frellsen, yet that the original debt he owed Frellsen was extinguished by the compromise of 6th January, 1877, and with it fell the vendor's lien, as it was not expressly mentioned in the act of compromise." As to the plea of novation, and whether the old debt was extinguished, he says: "Novation is not presumed; the intention to make it must clearly result from the terms of the agreement. C. C. 2190. Unless the intention *evidently* appears, a novation is not to be presumed. So, if subsequent to the contracting of a debt, some act passes between the debtor and the creditor allowing a further time, or appointing a different place for payment, or authorizing a payment to some other person than the creditor, or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum or the creditor to accept a smaller sum; in these and similar cases, according to the principle that novation is not to be presumed, it should be decided that no novation had taken place and that the parties intended only to modify, augment, or diminish the obligation, and not to extinguish the old debt and substitute a new one, unless the contrary is particularly expressed. Pothier on Obligations, par. 559.

"In this case Frellsen had notes of plaintiff, the consideration of which was the Limerick plantation, specially mortgaged to secure them. He had a judgment recognizing the validity of his debt and mortgage, and from the nature of the debt the privilege of the vendor. In making the transaction of January 6, 1877, I cannot find any express waiver of this right, nor does it appear evident that Frellsen intended to extinguish, give up, or discharge his lien, mortgage, or debt. On the contrary, from reference, more than once, in this contract, to the notes as being part of the purchase price, it is evident that the intention was to perpetuate every security he had for the payment of his debt.

"12 Rob. 219, Citizens' Bank vs. Cuny et al.

"3 An. 600, Bonn vs. Mahle.

"4 An. 281, Short vs. City of New Orleans et al.

"9 An. 228, Patterson vs. His Creditors.

"I am forced to the conclusion that by the act of compromise the debt of Frellsen was not novated, and therefore none of its accessories were extinguished or impaired.

"That the privilege of the vendor, as it springs from the nature of

the debt, exists by force of law, and need not be expressly stipulated, its renunciation must not be doubtful, but the language must clearly imply that the creditor intended to give up this right. Having arrived at this conclusion, it no longer remains an important question as to whether the words 'vendor's lien, etc.,' were properly or improperly used in the judgment. As there was no novation and the right springs from the nature of the debt, it is immaterial whether it be expressed in the judgment. The demand for the nullity of the judgment in 1281 must therefore be rejected, and the injunction as a necessary result must be dissolved."

For these reasons, the special judge dissolved the injunction, but refused to allow damages.

We concur in the opinion and reasons which we have quoted above.

The same issues being involved, and the same parties being before the Court in the case decided by our predecessors of this Court as in this, we think the judgment rendered on the appeal in which the claim for homestead was set up by the plaintiff herein is to be regarded as *res adjudicata* upon that question.

We are also of opinion that the recognition of the vendor's privilege, as complained of by the plaintiff, is not ground for annulling the judgment in 1281. The incorporation of these words gave the defendant herein no greater rights over the property seized than if they had been omitted. The homestead right was affected by the debt for the purchase price, and a debt for the purchase price created by operation of law a privilege upon the property affected by such debt. The insertion in the judgment, by the attorney who drew it up, in no manner added to the rights of the creditor or took any thing away from those of the debtor. The other allegations in the petition of plaintiff for the injunction in No. 1416 are without weight, and do not justify the perpetuation of the writ.

The motion to dismiss, made by J. T. Ludeling, the surety on the injunction bond, having been disposed of as to its form, we proceed to its consideration on the merits. The surety on an injunction bond has incurred obligations, but has certain rights which cannot be taken away from him without his consent. He is entitled to see the case tried according to law; a judgment rendered on the confession of the principal of his bond would bind the principal, but would not affect the surety. The case in which the bond is furnished should be called and disposed of in open court, under the forms and with the delays prescribed by law. His obligations must be strictly but legally construed. They consist in satisfying any judgment which the principal may be condemned to pay. It cannot be supposed that it ever entered the mind of the lawgiver and of sureties in *such* cases that a judgment rendered on the confession of

the principal, or without his having been regularly dealt with, could saddle a responsibility on the surety on such bond. We think that the omission to have proceeded regularly in obtaining the judgment rendered and to have ventured its validity on the agreement mentioned, entitles the surety, made appellee, to ward it off, and that he cannot be held responsible and liable on a judgment thus obtained. The point presented is a novel one, but is not, when tested by the rules of clear reason and justice in the absence of any express law or formal jurisprudence on the subject, of difficult solution.

So far as the plaintiff in injunction is himself concerned, the facts of this case, as shown in the record, in our opinion call for the imposition of damages in the dissolution of the injunction.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed so far as it dissolves the injunction at plaintiff's costs and rejects the demands of the plaintiff, W. J. Q. Baker; and it is further ordered, adjudged, and decreed that the said plaintiff, W. J. Q. Baker, be condemned to pay, for his wrongful injunction, damages to the amount of twenty per cent on the amount of two thousand dollars, the alleged value of the homestead claimed, and that said plaintiff, appellee, do pay the costs of this and the lower court, and that there be judgment in favor of J. T. Ludeling, the surety on the injunction bond, with his costs.

ON REHEARING.

BERMUDEZ, C. J. We have again given our attention to the questions of *novation*, of *res judicata*, of *homestead*, and of the surety's liability, involved in this case.

We do not consider that the circumstances of the case, as the record has brought them up, show that any novation has taken place, as claimed by the plaintiff. The transaction in no way altered the essence of the identity of the original contract, although it may, to some extent, theoretically indifferent, but practically significant for the plaintiff, have modified the nature of the contract, as to time and mode of enforcement of the payment of the debt. The act of compromise is perfectly reticent touching any express or even implied novation, either as to creditor's debt, or securities, or debtor, under any phase under which the case can be viewed.

We cannot infer, from the act of compromise, that the vendor's privilege was either intended to be or was actually abandoned and waived. It is a guarantee which attaches so tenaciously to the nature of the contract of sale on term, that the Roman law says that it adheres to the very entrails of the thing, *adheret visceribus rei.* It exists until

it has been formally and unequivocally relinquished. See the Bacchus case, 4 A. 313.

The question of privilege or no privilege of vendor is practically of no significance in a case like the present one, in which a claim to a homestead is asserted where the purchase price is unpaid.

Much stress is laid for a rehearing on the argument that the judgment of the previous court (Spencer, J.), dissolving with damages the injunction issued at the instance of Mrs. Baker and of her husband, does not constitute *res judicata*, because the suit was dismissed on an exception of "no cause of action," and that such dismissal does not constitute *res judicata*.

Exceptions of this class are of two sorts: 1st, those which tend to the dismissal of a suit because the allegations essentially necessary to warrant on proof the judgment prayed for are wanting; 2nd, those which tend to the dismissal of a case in which, although all the essential allegations have been set forth, the judgment asked, even on full proof of the averments, cannot be rendered *at all*, unless in violation of law. In the former case, it is within the sound discretion of the court to permit an amendment of the petition. It is generally exercised in favor of the amendment.

In the latter case, where it is found from the face of the petition, all of which must be taken for true, for the purpose of the exception, that the allegations, because self-destructive and irremediably insufficient, would not entitle the plaintiff to the relief sought, the exception is sustained, and the petition is usually either dismissed or rejected. In the first case, when the word "*dismissed*" is used instead of the word "rejected," it will be construed as meaning the latter, when sufficiently explained by the pleadings or by the reasons for judgment.

The exception of no cause of action, when affirmed, constitutes *res judicata* as effectually as if judgment had been rendered on the trial of the merits, after a full hearing of contradictory evidence on behalf of both parties. If it did not so mean, and was not so construed, then it would amount to a *nonsuit*, and the plaintiff would have authority to institute new proceedings. Why permit him to repeat uselessly allegations which if proved would not entitle him to recover?

In the case invoked by the defendant as constituting *res judicata*, the main question presented was: Is the plaintiff in that case, and in default of her, her husband, entitled to have the property seized for the payment of a debt secured thereon declared exempt as a *homestead*? The petition in the case shows that the consideration of the judgment on which execution had issued, and which the injunction had arrested, was the *purchase price* of the identical property in question, such price remaining unpaid. The court held, in formal language, that where the

purchase price of the property claimed as a homestead was not paid, the property will not, under the homestead law, be declared exempt from seizure and sale for the satisfaction of that purchase price. As a rule, courts, when dismissing a suit for want of sufficient proof in support of sufficient averments, should add the words *as in case of nonsuit*, lest the omission may be a cause of contrariety. The judgment sustained the exception of no cause of action, and expressly *rejects* (C. P. 319) the demand, and because the demand is thus disposed of and a writ of injunction issued on an inadmissible and illegal demand, which on its face is discountenanced and disallowed, the Court dissolves the injunction with damages. This judgment terminates and set at rest forever the differences of the parties in relation to the matter agitated in the case before us, which is the homestead matter. C. P. 319; 5 N. S. 664; 8 L. 187; 4 A. 231.

In deciding this case on its merits, we have enunciated clearly enough the same principle, that where the purchase price of the property claimed to be exempt under the homestead law has not been paid, the exemption will not be recognized. The non-payment of the price of sale is a good cause for the rescission of the contract. It is not until the price has been paid that title of ownership unconditionally vests in the purchaser. It is not, until then, that he can claim to have the property exempted from the payment of his debts, as his homestead.

In the case before us, the circumstance which existed when the first suit was brought, in which the judgment now pleaded as *res judicata* was rendered, remains unchanged. The purchase price has not been paid. The property, therefore, even if the first case and judgment in it had no existence, could not be pronounced as exempt, were it only for *that* reason. We consider that the judgment maintaining the plea of *res judicata* is correct. *Interest reipublicæ ut sit finis litium.*

We give credit to the ability with which the matter was presented from a different stand-point, but regret our inability to change our views in a case in which the plaintiff in his advanced age and troubles is entitled to sympathy. The letter and spirit of the law are, that the land unpaid for shall not be claimed as a homestead by the purchaser, unless the purchase price shall have first been paid. The principle of the moral law is, that no man can be permitted to enrich himself gratuitously, at the expense of another, against the latter's will. It is our sworn duty to construe, apply, and enforce the law which the assembled wisdom of the people has enacted as we find it in the statute-book, regardless of persons and of the consequences befalling its just enforcement. *Dura lex, sed lex.*

Further considering the matter, but on the defendant's application for a rehearing, we find, after a careful examination of the record, that

it establishes the correctness of one of the points raised by the appellant as to the amount at issue, the execution to enforce the payment of which was enjoined. We find that the injunction restrained the enforcement of the writs as to *all the property seized*, and was not confined to the homestead claimed. The plaintiff in execution, appellant herein, is therefore, in our opinion, entitled to damages measured by the whole amount which was covered by the injunction, and not alone to the alleged value of the homestead. We shall therefore correct the judgment in this regard.

We adhere to our previous opinion and decree so far as it affects the claims for damages against John T. Ludeling, the surety on the injunction bond. He was before us in this appeal, having been duly cited. We could not examine the matters set forth in the motion to dismiss in that proceeding, but had to do so on the merits of the case.

We held that the judgment against Baker was not binding on Ludeling, because he was not a party to the agreement whereby the case was to be decided in *chambers*, out of term-time, and because, for the reasons stated in our former opinion, he could not be liable. This appeal is from the judgment dissolving the injunction. If Ludeling was not bound by the agreement and by the judgment, which was irregular and nugatory as to him, and that very judgment could alone fix his liability herein, how can we assess damages against him, unless we arbitrarily supply what we deem to be a fatal defect? The consent of the parties to the trial of the matter in which Ludeling was sought to be made liable, in the manner in which it was tried, without his assent, and the appellant having selected and adopted such course, we think operates as a *discharge* of the liability of the surety on the injunction bond, and that issue is distinctly presented in this appeal.

It is therefore ordered, adjudged, and decreed that our former decree herein be set aside, and that the judgment of the lower court be affirmed, so far as it dissolves the injunction and rejects the demands of W. J. Q. Baker, plaintiff, and refuses to allow damages from John T. Ludeling; but that in other respects it be reversed; and it is now ordered, adjudged, and decreed that the appellee be condemned to pay for the wrongful injunction ten per cent damages on the whole amount of the execution enjoined, and as set forth in the writ issued in suits Nos. 1219, 1358, and 1281, consolidated, and that W. J. Q. Baker, appellee, pay the costs of the appeal and of the lower court.

No. 970.

J. E. McGUIRE, TAX-COLLECTOR, VS. JOHN P. PARKER.

Section 12 of Act No. 119 of the Legislature of 1880, imposing a license-tax of $25 per month upon all travelling agents from other States offering any species of merchandise for sale or selling the same, violates paragraph 1 of Section 2 of Article 4 of the Constitution of the United States, and is, therefore, null and void.

APPEAL from the Fifth Judicial District Court, parish of Ouachita. *Richardson*, J.

F. G. Hudson, District Attorney, for Plaintiff and Appellant.

Stubbs & Stillman for Defendant and Appellee:

First—Section 12 of Art. 119 of 1880 violates par. 1 of sec. 2 of Art. 4 of the Federal Constitution, by abridging the privileges and immunities of the citizens of other States. Cooley on Taxation, p. 64; 4 Wash. C. C. 371; 14 Ala. 627; 22 Ark. 556, 564; 11 Allen, 268; 12 Wall. 418; 27 Mo. 464; 14 Mo. 237.

Second—That it violates par. 3, sec. 8 of Art. 1 of the Federal Constitution, which vests in Congress the sole power to regulate commerce among the several States. 4 Wheat. 316, 425; 7 Minn. 140; 8 Wall. 139; 1 Otto, 278.

Third—It violates Art. 203, Constitution of 1879. 10 An. 56; 11 An. 68; 13 An. 56; 14 An. 318; 20 An. 585; 21 An. 301.

Fourth—It violates Art. 206, same Constitution, in that the license-tax is not graduated, but fixed and absolute.

The opinion of the Court was delivered by

TODD, J. This is a proceeding under section 17 of Act 119, approved April 10, 1880, instituted by the sheriff and tax-collector of the parish of Ouachita, to collect from the defendant a license-tax, State and Parish, of twenty-five dollars per month for each, imposed under the 12th section of said act upon "all traveling agents from other States offering any species of merchandise for sale or selling the same."

The defendant resists the payment of this license upon several grounds, among which we find the following:

That the imposition of this license violates paragraph one of section two of article four of the Constitution of the United States, which declares "that the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States."

There was judgment for the defendant, and the plaintiff has appealed.

The question presented is whether the section of the statute imposing this license violates this clause of the Federal Constitution.

This provision affords one of the most important constitutional guarantees for the protection of the citizen.

It was, doubtless, intended to secure to the citizens of each State the enjoyment, every where within the limits of the Federal Union, of those fundamental privileges which belong of right to the citizens of all free governments, and to prevent an unjust discrimination on the part of any State against citizens of another State in the full and free exercise of these privileges.

We gather from the decisions of the Federal and State Courts that among the privileges and immunities this provision was intended specially to secure were the enjoyment of life and liberty, the right to acquire and possess property of every kind, to pass through and reside in any State for the purpose of trade, the right to sue in any of the State Courts, and to sell or dispose of property, real or personal, and all such similar immunities. With respect to these privileges, it was designed to place the citizens of all States upon a common basis of entire and perfect equality.

The increased inter-State trade and commerce of late years has developed a class of business men, now recognized as a distinct profession or calling, known and designated as "commercial or traveling agents," who travel throughout the different States as representatives of commercial houses, and sell goods and merchandise by orders. This class of agents is made the subject of legislation by the section of the statute above referred to. Some of them are citizens of this State, and some of other States.

The section in question imposes a license of twenty-five dollars a month on "traveling agents from *other* States," but exacts no license or tax upon the same class of persons who are citizens of this State. And the question again recurs, does this violate that provision of the Federal Constitution which declares that "the citizens of each State shall be entitled to the privileges and immunities of the several States?"

Privileges and immunities are synonymous terms. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege.

When we consider the meaning of these terms, and reflect upon the important object sought to be accomplished by this constitutional provision, so essential, not only to unrestricted trade and intercourse between the States, but even to the liberties and highest privileges of the citizens of a common country, we are bound to conclude that a requirement of a State law that discriminates so glaringly against citizens of other States and in favor of the citizens of its own State, is designed

to defeat the objects and purposes which this wise constitutional provision was intended to secure, and, therefore, violates the spirit of the clause invoked. Nor is this a new question; for we are supported in this conclusion by the highest legal authority.

Cooley in his work on Taxation, page 64, says:

"The Federal Constitution provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. Among these privileges is that of being exempt in other States from higher taxes or impositions than are paid by the citizens of such other States. Under this provision, while it is entirely admissible to levy taxes upon the business and property of non-resident traders within the State, it is not competent to require them to take out a license and pay therefor a sum greater than that demanded of residents. Different methods of procedure may be expedient in order to secure uniformity of taxation as between residents and non-residents, and these are not objectionable, if uniformity is the purpose, and they have a tendency to secure it."

It has been held, by the Supreme Court of the United States, that the clause of the Federal Constitution referred to "relieves citizens from the disabilities of alienage in other States. It inhibits discriminating legislation against them by other States. It insures to them in other States the same freedom, privileges, and immunities possessed by the citizens of those States in the acquisition and enjoyment of property, and secures to them the equal protection of their laws in their lawful pursuits." Paul vs. Virginia, 8 Wall. 168; Ward vs. Maryland, 12 Wall. 418; Carfield vs. Coryell, 4 Washington C. C. 371, 380.

And again:

"The main object of this clause was to prevent each State from discriminating in favor of its own people, or against those of any other. It secures not only absolute equality of rights and privileges with every citizen of each State, but all such privileges and immunities in any State as are by the laws and constitution thereof secured and extended to her own people of the same class." Davis Pierce, 7 Minn. 13.

It is with reluctance that we declare null any provision of the law establishing the revenue system of the State, but we are compelled to yield to the weight of authority on the subject.

There are several other questions raised by the pleadings, but the views we have expressed on this first point presented, which are conclusive of the case, render it unnecessary to discuss them.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be affirmed with costs.

No. 984.

SUCCESSION OF EDWARD HERRON. ON OPPOSITIONS TO FINAL ACCOUNT.

An Opponent to the Account of an Administrator, who has not appealed from the judgment of the lower Court, and who is not Appellee either, cannot be heard in this Court asking for an amendment of the judgment.

It is too late to urge an objection to the legality of the appointment of an Administrator, in an Opposition to his final Account, when it appears that he was regularly appointed by a competent Court.

When the sale of Succession property was legally ordered and made, and the Administrator received the price thereof in Confederate money, which was then the only currency in the State, he cannot be held liable for the said price in any other than the same Confederate money. Decision in Succession of Womack, 29 An. 579, affirmed.

APPEAL from the Fifth Judicial District Court, parish of Ouachita. *Richardson*, J.

Stubbs & Stillman for Opponents and Appellees:

First—An administration is unnecessary when there are no debts.

Second—If such an estate is administered, and to its material injury, the administrator is liable personally for his acts of maladministration.

Third—An administrator who forces a protracted administration of over sixteen years of an estate perfectly solvent and owing no debts, and who fails to file a single annual account of his gestion within that period, should be compelled to pay interest at ten per cent per annum on sums in his hands, from a period one year subsequent to the time of his receiving and failing to account for them down to their payment.

Cobb & Gunby for the Administrator, Appellant:

First—When the administrator of a succession, opened during the war, received Confederate money, the only currency in circulation, for the price of personal property sold at succession sale, and afterwards distributed the pro rata share of the proceeds to seven of eight heirs, the eighth being a minor, to whom, on attaining her majority, her pro rata is tendered in Confederate currency, and refused, the loss should fall on the latter, and not on the administrator, if he is shown to have done his duty.

Second—When what is known as "currency," or current money, is received by one acting in a fiduciary capacity, it is not necessary for him to keep the specific bills or coins received, but it will suffice to tender a like amount of such currencey. *Aliter*, when uncurrent money or property is received by such fiduciary. Succession of Womack, 29 An. 579.

The opinion of the Court was delivered by

TODD, J. Edward Herron died in Ouachita parish in January, 1863, leaving an estate appraised at $7611 25, of which $2811 25 was personal property, and a number of heirs, some of whom were minors.

Shortly after his death, David McQuiller, a son-in-law of the deceased, was appointed administrator of his succession; and soon after his appointment caused to be sold, under an order of court, all the personal property belonging to the succession. The sale was for Confederate money. The shares of the heirs of age in this money was paid over to them by the administrator, and their receipts taken for the same. The land was partitioned among all the heirs.

On the 25th of August, 1879, David McQuiller, at the instance of the two of the heirs of deceased parties to the present proceeding, rendered an account of his administration of said succession, showing a balance due by the succession to him of $172 31. This account was opposed by Catherine E. Herron, wife of R. A. Phillips, and R. A. Phillips, tutor of the minor, Mary E. Phillips, child of Louisa V. Herron, deceased, who was a daughter of Edward Herron, deceased.

The grounds of the opposition were substantially these: That there were no debts owing by the succession, and that the appointment of an administrator was unnecessary; that there was no necessity for the sale of the personal property, and that the administration was unwarranted and injurious to the succession. Opposition was made, also, to several credits claimed by the accountant.

There was judgment rendered in favor of the tutor of Mary E. Phillips for ninety-five dollars, with five per cent interest from the 16th May, 1867; and from this judgment the administrator has appealed.

The opponents have asked in this Court an amendment of the judgment. This judgment was only in favor of one of the opponents (Mary E. Phillips), and the silence of the judgment as to the claim or opposition of the other opponent, Catherine E. Herron, is equivalent to its rejection. She did not appeal from this judgment, and the administrator is appellant only from the judgment against him in favor of the opponent, Mary E. Phillips. The other opponent, Catherine E. Herron, being neither appellant nor appellee, has no right to be heard before this Court, nor ask for an amendment of the judgment. 6 L. 228; 8 L. 192; 14 A. 564; Boutté vs. Boutté, 29 A., N. R.

It is too late to urge an objection to the legality of the appointment of an administrator in an opposition to his final account, when it appears that the appointment was regularly made by a competent court, and the succession has been fully administered.

In this case the evidence shows that there were some debts owing by the succession, though small, it is true, compared with the property.

It has, however, been held by this Court, that "even if there be no debts, the appointment of an administrator may sometimes be advantageous, and even necessary. The propriety of subjecting successions to such a charge must rest in the judge's discretion on the facts before him." 3 A. 502.

And again: "That where several of the heirs were minors, for whom the succession could only be accepted with the benefit of inventory, in such cases the Code specially authorizes the appointment of an administrator." Dees vs. Tildon, 2 A. 412. See, also, 2 L. 299; 7 R. 24.

Without expressing our entire concurrence in the decisions from which we have quoted, we are satisfied that the legality of McQuiller's appointment cannot be questioned in this proceeding.

Nor can the sale of the personal property complained of be successfully attacked at this late day and under this form of proceeding.

The sale was not opposed at the time by the heirs of age, nor by the tutor of the opponent, who was then a minor; but, on the contrary, the evidence in the record shows that it was approved by all parties interested. Besides, when we consider the situation at the time this sale was made, and all the facts, circumstances, and surroundings connected with it, we are not prepared to condemn the sale as unnecessarily or illegally made. In regard to the condition of affairs at that time, we find the testimony in the record of the most respectable witnesses. Among others, Judge Robert Ray, on the trial of the case, was called as a witness for the opponents, and we quote from his testimony as follows:

"I suppose it would have been the best thing that could have been done with personal property belonging to an estate to have sold it, and not tried to keep it, especially such things as could be taken by armies. * * During that year the country was filled with troops, and, I believe, in 1863 a raid was made, and they swept away every thing like hogs and cattle; and if one army had respected it, the other would not."

And J. W. Scarborough, a neighbor of the administrator, and an old citizen of the parish of Ouachita, of the very highest respectability, stated on the trial:

"I think it would not have been safe for an administrator to have attempted to keep the personal property at that time, because the personal property of the succession of Herron was perishable property, and without personal attention would certainly have gone to waste. It would have cost nearly as much to have kept the property as it was worth.

"The personal property belonging to people living in that part of the country, including mules, cattle, etc., was taken from them by one or the other armies as they occupied the country.

"As a prudent administrator and man, I think Mr. McQuiller acted right in the course he took in selling the property as soon as possible. I think I advised him to this course myself."

This testimony, and that of other witnesses to the same effect in the record, is uncontradicted.

Under these circumstances, and with these facts before us, we must conclude that the sale was not improperly or illegally made. C. C. 1051, 1162.

If the sale was proper, it could only be made for Confederate money, as that was the only currency in circulation, and its circulation enforced by public sentiment, and indirectly by the legislation and action of the only government which then exercised authority in the State, and possessed the power to compel obedience to its laws.

The administrator was then practically compelled to receive Confederate money for the property sold; and having thus received it, and it having become worthless in his hands, it would be abhorrent to our sense of justice to compel him to pay to either heirs or creditors gold, silver, U. S. currency, or, in fact, any other money than he received. The loss must be theirs, not his, as was well said by our immediate predecessors in 29 A. 579, Succession of Womack:

"The sale of the movables was a necessity. Witness says they or their value would have been lost if they had not been sold. There was but one currency in which the administrator could be paid at that time. The court that ordered the sale knew that. No other money could have been permitted to pass current by the government that dominated the country where these proceedings took place, and the use of force was not needed to effectuate this policy. A spontaneous and clamorous public sentiment supplemented and supported the financial policy of that government. The administrator could have done nothing but receive the Confederate currency, and there is no pretense that he derived advantage from its use. It perished in his hands. He ought not to be held responsible for it."

The present case is plainly within the purview of this decision.

It is shown that the only money other than Confederate money that ever came into the hands of the administrator was fifty-seven dollars and seventy-five cents in gold and silver, mentioned in the inventory; and the evidence shows that he paid out more than this sum for the estate, after the termination of the war, in United States currency.

Since it is shown that the entire fund received by the administrator, with the exception mentioned, was in Confederate money, it would be idle in us to discuss whether this fund was properly distributed, and whether the objections raised by the opponents to some of the credits claimed for alleged payments made were just or not.

It is shown that the administrator tendered to the mother of opponent, who was herself a minor at the time of the death of Edward Herron, when she became of age, her share of the Confederate money received by him, which she declined to receive, but in so declining, according to the evidence in the record, she recognized that it was her loss, and not the administrator's.

With these views of the issues embraced in this case, and of the legal principles involved, we conclude that there was no liability on the part of the administrator to the opponent for any amount.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed; that the opposition of the opponent, Richard A. Phillips, tutor of the minor, Mary E. Phillips, be dismissed, and that in other respects the judgment of the lower court remain undisturbed; opponent to pay costs of opposition in both courts.

No. 987.

ELIZABETH F. BAILEY, TUTRIX, ET AL. VS. DAVID WARD.

Permission given verbally to occupy immovable property during the lifetime of the donee without any rent or charge, does not confer any right of usufruct, use or habitation, but simply constitutes a tenancy at will, revocable at the pleasure of the owner.

Oral evidence is admissible, in such a case, to prove the simple fact of the permission to occupy the property without rent, but not to establish any title to the property itself, whether of ownership or usufruct, use or habitation, derived from, or created by such permission.

APPEAL from the Eleventh Judicial District Court, parish of Union. *Graham*, J.

James A. Ramsey Attorney for Plaintiffs and Appellees:

A contract by which one party transfers and grants to another the right to occupy and use land, and derive from the same all the benefits of it during his or her natural life, free of any charge, is a contract of usufruct, and can be established only by written evidence. C. C. 470-1, 533-40, 628, 646, 2275, 1536; 7 An. 103; 23 An. 242.

One who occupies the premises of another, even with his consent, for a time, gratuitously, is bound to deliver the property to the owner upon demand, and if he does not deliver it upon demand he must pay rent thereafter.

J. E. Trimble for Defendant and Appellant:

The right to the use and occupancy of land does not imply any right of

ownership therein, and may be proved by parol evidence, re-affirming 18 L. 70; 8 M. 702; 2 L. 161.

A personal servitude, as a real servitude, may be established by the destination made by the owner of the land, and this destination can only be established by parol evidence. The destination is equivalent to title.

Continuous apparent possession for ten years gives title to a personal servitude.

One possessing real property through the owner and with his consent is a possessor in good faith, and if evicted is entitled to pay for all improvements placed upon the land.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This suit has for its object the recovery of real estate and of money for the occupancy of the same.

The defendant resists dispossession and payment, relying upon acts of benevolence on the part of the owner.

The circumstances of the case, which it is unnecessary to reiterate, are fully set forth in the two opinions delivered by the previous Court in this matter, on the subject of the admission of *oral* testimony in support of the defense. To those opinions we specially refer. By the decree rendered, the case was remanded for the purpose of admitting the evidence previously rejected. That testimony was offered, but was opposed. To adverse ruling a bill was taken, and the evidence received.

We do not consider that the late Court, by remanding the case, intended to permit the introduction of parol evidence to show title to an element of ownership of real estate, but merely to allow the defendant to establish the *character* of his alleged title, in view thereafter of passing upon the validity of such testimony and of regulating its effects.

So far as the testimony is offered, and was permitted to be introduced, to show any title whatever to the realty, whether in the shape of ownership, usufruct, use, or habitation, it is illegal, and is to be eliminated, as the law requires written evidence in such cases; 7 A. 103; 23 A. 242; but, in so far as it was purposed to show *permission* on the part of the owner to occupy the property without paying rent or contribution for such occupancy, it is legitimate and can be weighed.

The evidence establishes that McLelland, the owner of the land, and father of the minors, plaintiffs, had given verbally the free enjoyment of the land to his mother and to her husband, his father-in-law, *for the term of their life*, thereby exonerating them from all rent during that period. The verbal permission to occupy *during life* cannot have the effect of conferring any right of usufruct, use, or habitation, and

must be considered as not uttered. Such permission must be treated only as authority to occupy the property during the good pleasure of the owner, thus constituting the defendant a tenant at will, subject to be ejected at any moment. We find no evidence of the value of the occupancy of the land.

The District Judge gave judgment in favor of the plaintiff for the land, but did not allow the rent claimed. Plaintiff must be nonsuited as regards the rent claim.

It appears that improvements have been put upon the land by the defendant. The right to remove them, or demand their value, must be reserved to the defendant.

Judgment affirmed with costs, reserving the rights of parties to claim value of occupancy on the part of plaintiff and value of improvements on the part of defendant.

ON APPLICATION FOR REHEARING.

We are asked to allow to the defendant in this suit the value of the improvements put by him on the property which he was to occupy free of rent, as the evidence in the record shows such value. Conceding that proof of such value has been introduced and establishes the claim, it does not follow that plaintiff is to be condemned to pay under the showing made for such improvements. As a condition precedent, it should have been established that plaintiff would not permit their removal. There is no evidence to prove that the defendant offered to remove those improvements. The testimony, on the contrary, shows his determination not to move his person, effects, or property, and to remain in possession of the land to the end of his life.

We think it is just to leave to both parties the assertion, vindication, and liquidation of the rights which they uphold the one against the other; the plaintiff to claim value of occupancy, and the defendant to claim value of improvements, in subsequent proceedings.

Eliminating, as we have done, from the testimony that portion of it which was admitted to show authority to occupy the land, "*during life*," we construe the remaining evidence which is considered as legal as proving *nothing beyond a tenancy at will.*

Rehearing refused.

No. 966.

STATE OF LOUISIANA VS. CHARLES NELSON.

The power of this Court, in passing upon questions of law, in criminal cases, to look into the *facts* with which those questions of law are blended, is fully discussed in this Opinion.

This Court cannot take cognizance of the evidence upon which a Motion for a New Trial was refused by the Court *a qua*, unless that evidence is embodied in a Bill of Exceptions.

Rules laid down for the conduct of the District Courts, juries and sheriffs, in criminal cases.

APPEAL from the Fifth Judicial District Court, parish of Richland. *Richardson*, J.

F. G. Hudson, District Attorney, for the State, Appellee.

Boatner & Liddell for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was indicted for murder, tried, convicted, and sentenced to hard labor for life.

On appeal, he complains:

First. That the lower court erred in permitting the prosecuting attorney to put to a State witness on the stand, during the trial of the case, the following question: "*Previous to the killing of the deceased, did you ever tell the accused that if he did not quit frailing the child, you would give him a frailing?*"

Second. That the lower court erred, in overruling his motion for a new trial, charging misconduct on the part of the sheriff and jury, in this:

(a). That the sheriff, without the knowledge or consent of the court or of the accused, after the jury had received the charge of the court and retired, and were deliberating on their verdict, took them to the hotel in the town for supper, and afterward removed them to the court-house;

(b). That the jury, while in the court-house, had access to the law-books used upon the trial, and did examine them in coming to their verdict.

Third. That the lower court ered in refusing a juror named to be sworn and heard, as a witness.

1. The question which the District Judge allowed the State to propound and the witness to answer does not appear to have been intended to elicit any important or significant fact. Its object was not to prove an offense not charged in the indictment. It was not intended to prove a *frailing* of the child, but was merely designed to show the *telling* of the witness to the accused. The fact sought to be drawn

might have been made to appear by a question put in a different and unquestionable form. The question propounded was one of easy answer.

Which ever way it was answered, provided the answerer was categorical, no injury could result to the accused, as the mere *telling* of any thing to him by the witness could not have incriminated him in the least degree. It may well be, however, that the witness, after answering the question, did add details uncalled for, which would have been inadmissible, but the bill of exception does not incorporate what was uttered by the witness in response to the question. The witness could and should have been guarded, at the instance of the accused or his counsel, before answering, and instructed by the court, as to the mode of answering. It was the right of the accused to have requested the judge so to direct the witness; but it does not appear that any such warning was asked or given. If the witness gave details or stated matters not responsive to the answer, and which should not have been admitted, and which went to the jury unqualified, and which influenced the jury to the injury of the accused, he has no one to blame but himself for not availing himself of privileges accorded to him by law. He cannot now ask this court informally to relieve him, without presenting his grievances in proper form, and even *then*, without showing that they are well founded.

The Court considers, without further light, that the question was irrelevant, and that so must have been the answer, and that neither can have prejudiced the accused.

It is possible, however, that the question was intended to prove some fact forming part of the *res gestæ*, or springing from the act under trial, or which was to be a medium to prove an aggravating circumstance, concurrent with the act charged in the indictment; such, as for instance, the *intent* of the accused. If the question was so designed, it was legitimate to permit it to be propounded. If the witness, instead of answering categorically, and no further than was necessary, had improperly attempted to amplify his answer, or had actually unduly magnified it, he might have been prevented from giving an unauthorized utterance, or the jury might have been instructed to disregard or ignore the superfluous, uncalled, or unauthorized statement. 3 A. 512; 30 A. 457, 601; Greenleaf, part 3, ch. 3, § 434; 2 Russell on Cr. pp. 694, 698; Wheaton's Crim. L. v. 3, 3090.

It cannot be perceived how the answer of the witness, if it was categorical and proper, could have proved detrimental to the accused, or how it could have proved of any significance to the prosecution.

The bill of exception is not sufficiently full and explicit to enable us to say that the ruling of the District Judge (which we must presume to

be correct until the contrary is established) was erroneous and wrongfully made.

We cannot afford relief to parties who do not place their grievances in the only form in which the law requires them to be framed to demand and obtain our attention.

2. We do not consider that we lack authority to revise the judgment of a lower court, refusing a new trial in a criminal case, over which the Constitution vests us with jurisdiction.

It was formerly and for a long period considered that in limiting the jurisdiction of the Supreme Court in criminal cases before them to questions of law alone, the constitution had, *in terms*, excluded from them all cognizance of questions of facts, and, therefore, that the Supreme Court had no power to inquire whether the discretion of the lower court in refusing a new trial in such cases, on the ground of misconduct of the jury, or want of due diligence in procuring the attendance of witnesses, was or not properly exercised.

2 A. 838, 983 ; 3 A. 500 ; 4 A. 438 ; 5 A. 398 ; 6 A. 311, 593, 657, 691 ; 7 A. 47, 122, 284, 531 ; 8 A. 114 ; 10 A. 501 ; 11 A. 478 ; 13 A. 45 ; 14 A. 79, 673, 785 ; 20 A. 236 ; 22 A. 9, 468 ; 23 A. 149, 433 ; 25 A. 418 ; 30 A. 305, 539, 1324.

A review of the contradictory, vacillating, unsettled, and unsatisfactory jurisprudence of the State and of the conflicting foreign authorities by which it was sometimes propped, leaves the mind, however, under the fortunate and salutary impression that the Supreme Court would have the power to review the ruling of the court in such and similar instances, when the facts, upon which it was made, are established and presented, with the question of law submitted *in a bill of exceptions.*

Had that jurisprudence absolutely consecrated the doctrine that the Supreme Court has no power to revise such ruling under any contingency, even when the facts are embodied in a bill of exception, we would unhesitatingly decline to assume to countenance, and would repudiate such doctrine, however ancient, for we would then have dealt with it as with one fundamentally erroneous, which, if sanctioned, might prove exceedingly oppressive to the accused, in recognizing in the lower judge arbitrary powers bordering upon autocracy, to which no one can claim that any particular sanctity attaches under our system of government. The actions and rulings of judicial officers, presiding over the trial of cases in which the liberty or life of persons is at stake, should always remain open to criticism, revision, and correction by the superior legitimate authority in proper cases.

It unquestionably was the object of the framers of the different constitutions of this State, which limit the jurisdiction of the Supreme

Court in the criminal cases specified to questions of law *alone*, that such court should not have the power of reviewing the facts proved on the trial of the case and passed upon by the jury, and so, that it should not have the right of determining, upon those facts, the guilt or innocence of the accused; in other words, of *reviewing the verdict of the jury*. It was deemed by them that such matters were to be left *solely* and *exclusively* to the determination of competent juries, and that with matters within such province the appellate court should not interfere. They, however, have provided for the security of the accused, whose rights are vigilantly protected, that the Supreme Court should have the power of passing upon *questions of law*.

Questions of law, as a rule, are so intimately connected or blended with questions of fact, that it is almost impossible to consider the former without dealing with the latter. The facts may have been admitted or agreed to, or may have been proved, leaving the appreciation thereof, or the application of the law thereto, to the court; but in any contingency, there must necessarily exist a certain order or condition of facts, upon which, as a basis, the decision of any question of law can be predicated.

In the issue before us, the question would be:

"Under the facts which the record establishes was the accused entitled to a new trial?"

A mere question of law would, after all, be presented.

The prohibition to the exercise of the jurisdiction of this Court lies to its power to find pure questions of facts, such as were submitted to and found by the *jury*. The inhibition does not extend to the questions of law based upon facts submitted to and determined by the *judge*. Of course the Court could not review, under any circumstance, the verdict of the jury on the facts before them, on the trial of the accused.

This Court has, therefore, authority to consider the facts *established* on a motion for a new trial, when they are such as were not submitted to and passed upon by the *jury*, but were considered and decided by the *judge* only. It has also authority to determine whether under the circumstances of this case the lower court should or not have granted the new trial asked, provided the matter be presented in the proper form.

The lower court on the motion for that relief considered the *affidavit* of the defendant, as well as the evidence introduced to show misconduct on the part of the sheriff and jury. That testimony was taken in writing. The lower judge overruled the motion for a new trial, but *no bill was reserved*. Under the jurisprudence as it is, this was a grave omission.

Had it not been ruled otherwise, we would unhesitatingly hold that it was unnecessary to present those facts in the shape of a bill of exceptions, as it may well be that the exceptor and the judge may disagree

as to what the facts proved were, make different statements, and this to the mystification of the appellate court. We could not perceive, even were it otherwise, how a bill could be required, as a bill of exception is intended solely to put in the record matters which, without it, would not be found in it.

However incongruous the ruling may appear, it is infinitely preferable that it do exist than if it did not; as in the latter case, the accused would be without remedy against the adverse ruling of the lower judge, as this Court could not extend any.

The difficulty of a disagreement between the judge and counsel as to the facts proved may well be obviated by requiring the testimony to be reduced to writing, and, next, annexing it to a bill of exception, as a component part thereof, it being the clear duty of the judge in cases of motions for a new trial, involving facts not submitted to the jury, to have such testimony put of record at the instance of either party, as the same is to be weighed, *first*, by the judge *a quo*, and, *next*, by the appellate tribunal.

In the instance before us, both the evidence and the overruling of the motion for a new trial are of record; but as the matters urged as grounds for a new trial are not presented in the form prescribed by long existing jurisprudence, we do not feel authorized to pass upon the same, and, therefore, cannot disturb the refusal complained of. While we do not propose to pass upon the sufficiency of the evidence to justify a new trial, we make it our duty, for the better administration of justice, to take occasion to express our views on the law which should regulate courts and juries after submission of a criminal case, in instances like those presented by the record:

1. After a jury has received the charge of the judge, and has retired to deliberate on its verdict, it should not be promenaded through the streets of a city or town, or outside of its deliberation room. The jury should be retained in that room, where the meals and refreshments to which they are entitled while engaged in the discharge of the onerous and important functions imposed upon them can be furnished them, the latter to a reasonable extent. The dangers attending such removal of juries from their room of deliberation, unless in cases of indispensable necessity, which exposes them to improper communications, by language spoken, written, or signified with outsiders who may so easily convey reprehensible information, or offer criminal inducements, unnoticed by the officer in charge, at once suggest themselves to an experienced and impartial observer.

Against such practices, in cases of felony, we make it the duty of district judges, of district attorneys, and of sheriffs, particularly, to guard.

2. The proper course for juries whose members desire information touching the law involved in cases submitted to them, is to apply to the presiding judge, who is authorized to charge them accordingly, in open court, in the actual or constructive presence of the parties, and from whom it is safe for them to take the law to be as by him officially expounded to them. 11 A. 81, 206, 429; 12 A. 264, 386.

It would be irregular for the prosecution or for the counsel of the accused, without the sanction of the court, or the consent of the accused or knowledge of the State attorney, to submit books and authorities to the jury. It would be even imprudent to allow the jury to have access to law-books found in their room or elsewhere, without permission of the court or consent of the parties, as jurors who have not been trained to the knowledge and construction of the law may well misunderstand and misapply it, to the injury as well of the State as of the accused.

Wheaton's Am. Crim. Law, § 3138, 3149; Graham & Waterman on New Trials, vol. 2, p. 332; R. S. 991; 30 A. 539; 29 A. 715; 19 A. 143.

3. The proposition that a juror sworn to do his duty, and who is presumed to have done it, cannot be offered as a witness to impeach his official act by showing under oath his own misconduct, or that of his fellow-jurors, in disregard and contempt of the law, is too well established to be for one moment questioned. The court must derive its knowledge of the misconduct of juries from some other source than the jurors themselves. 3 A. 435; 6 A. 653; 1 N. S. 514; 11 L. 141.

It is therefore ordered that the judgment appealed from be affirmed.

ON PETITION FOR A REHEARING.

It is due to the counsel who represented the accused, both in the lower and Supreme Court, to say that they have done so with a learning and zeal which are the more creditable, as the defendant is a pauper, incapable of offering any remuneration for the valuable services rendered him. No blame whatever can be attached to them for not presenting the matters incident to the motion for a new trial in the shape of a bill of exception, as the bench and bar have been, for a long series of years, in doubt as to whether the facts submitted to the judge in such a proceeding could at all be reviewed by the appellate court. District Judges have gone so far as to refuse permitting the testimony from being taken at all in writing, and in this they were sustained.

It is fortunate, however, that the testimony was so reduced in the present instance.

We readily admit the uselessness of a bill where the evidence and the ruling are of record; but think that we have gone far enough *in favorem libertatis civis*, without upturning a sort of irregular practice,

which was a step in the right direction, and which may be viewed as a protest against the refusal of the judge to grant the relief sought. The rulings in the cases of Swayze and Gunter, 30 A. 1323, 537, do not lay down that this Court can review the facts on a motion for a new trial, in the absence of a bill of exception. They refer to the 11 A. p. 478, which requires the taking of such a bill. The opinion which we have rendered in this case itself shows how inconsistent and superfluous we consider such a practice: but we are not prepared to alter our views presently on the subject.

For the quiet of the consciences of the counsel who have conducted the defense, we will take the liberty of saying that even had a bill of exception been taken in this case embodying the *affidavit* and the testimony produced on the motion for a new trial, and had we to express an opinion on that evidence, we would have considered it as insufficient to support the alleged grounds of misconduct on the part of the sheriff and jury.

The acts complained of were tolerated under what was considered to be admitted rules in such instances. Those which we have laid down are intended to operate prospectively, and cannot, in justice, be applied to cases originating previous to their announcement.

Rehearing refused.

No. 989.

W. R. TUGWELL vs. J. L. TUGWELL.

When the Community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and of the deceased wife attach, *at the moment of its dissolution*, to the property of the Community, subject to the payment of the Community debts. This right will be recognized if sued for in the proper action, and may be enforced at any time, when demanded by a partition of the property or otherwise,—even when the property is burdened with the usufruct in favor of the surviving husband; unless an opposition is interposed by creditors of the Community, or by the Administrator of the succession of the deceased wife, demanding security for the Community debts.

Heirs of the deceased wife, suing, not for a partition of the Community property, but only for the recognition of their rights in the same, need not make their co-heirs parties to the suit.

Nor is it necessary that their heirship should have been decreed by the Probate Court, before the institution of a suit for the recognition of their rights in the Community property.

APPEAL from the Eleventh Judicial District Court, parish of Union. *Graham*, J.

James A. Ramsey for Plaintiffs and Appellants:

When a married woman dies, leaving at her death an undivided interest in community property in possession of the surviving husband, and when at her death the community owes no debts, her heirs may sue in the District Court for their share of said community property as soon as the husband enters into a second marriage. 9 L. 580; 12 R. 266; 4 O. S. 653; 3 A. 562; 5 A. 381-2; 6 A. 295.

An heir may sue for his share of a succession without making his co-heirs parties to the suit. 4 O. S. 472; 3 L. 134; 5 L. 430.

In an action for the ownership and possession of property in the District Court, that court may inquire into the proceedings of the Probate Court when plaintiffs were no parties to those proceedings. 28 A. 303; 10 O. S. 1; 11 L. 384, 390; 12 L. 214; 27 A. 625.

An heir may sue for the possession of property inherited by him, which has been disposed of by defendant, without ever having been recognized as heir by a judgment of the Probate Court. 7 R. 183; 5 R. 9; 2 L. 300; 7 L. 292; 12 R. 258.

J. E. Trimble and Rutland & Hyams for Defendant and Appellee:

The father, who is tutor to his minor children, cannot be forced by their major co-heirs to surrender to them specific property, nor stated amounts of money, until a settlement of the tutorship has first been made, showing what is due them. Baird, Under Tutor, vs. Love et al., 32 An., not yet reported.

Neither can the heirs of the deceased wife claim certain property nor definite sums of money, from the surviving husband, until there has been a settlement of the community, where one has existed. 25 An. 214, 379.

A suit by some of the heirs of a succession for a certain portion of the property belonging to the said succession is in the nature of a suit for partition, and cannot be maintained where the other co-heirs are not cited or made parties thereto. 19 La. 239; 17 La. 348; 4 An. 56, 260.

The opinion of the Court was delivered by

Todd, J. The plaintiffs in their petition allege in substance:

That they are the legal heirs of their mother, Mrs. Sarah Tugwell, and the issue of her marriage with Joseph L. Tugwell, defendant in the suit; that their mother died in 1865, and at her death there was property, real and personal, belonging to the community which existed between her and her husband, Joseph Tugwell, who survived her; that their mother brought into the marriage eight hundred dollars, which had been disposed of by her husband; that in October, 1866, J. L. Tugwell contracted a second marriage; that since the death of their mother

the defendant had disposed of all the personal property that belonged to the community, and continued to occupy the land; that there were, besides petitioner, five other children of said marriage still surviving; that in 1878 the defendant qualified as tutor to two of the children and co-heirs, then minors, and caused an inventory to be made of nearly all the property that belonged to the community at the time of its dissolution, including in this inventory the property that was no longer in existence, and that by the advice of a family meeting, alleged to have been illegally composed, caused all the land that belonged to the community to be adjudicated to himself.

It was alleged that at the time of the dissolution of the community it owed no debts.

By inheritance from their mother, they claim to be owners of two undivided ninths of the land, and the rents thereof from the date of the second marriage of the defendant; also the same interest in the value of the personal property of the community alleged to have been disposed of, and also the amount alleged to have been brought by their mother into the marriage. Judgment was asked for accordingly, with the further prayer that the adjudication of the community land referred to might be declared null.

An exception was filed to the suit in substance, as follows:

First. That the petition did not allege that there had been a settlement of the community between the mother of the plaintiffs and the defendant, nor of the tutorship of the minor heirs; and that until such settlement, both of the community and the tutorship, plaintiffs had no right of action in the District Court.

Second. That the co-heirs were not cited, nor made parties to the suit.

Third. That an action to annul the judgment and proceedings in the Probate Court will not lie in the District Court.

Fourth. That plaintiffs cannot sue defendant for a debt due their mother, without first being appointed administrators of her succession, or having themselves previously recognized as her heirs.

Fifth. That plaintiffs cannot maintain a suit against defendant individually for property which he holds as tutor, until such property is first shown by an account to belong to them.

Sixth. That the Court is without jurisdiction *ratione materiæ* and *ratione personæ*.

The exception was sustained by the judge *a quo*, and plaintiffs have appealed.

First—For the purposes of this exception the allegations of the petition must be considered as true. It is distinctly alleged in the petition that at the time of its dissolution the community owed no debts. And this pre-

sents the question, whether the heirs of the mother can sue to recover her interest in the community that existed between her and her surviving husband without alleging and showing that there had been, previous to the suit, a settlement of the community, even though they do allege that such community owed no debts at the time of its dissolution.

We hold that such an action will lie, and the allegations of the petition are sufficient to maintain it. If there were no debts owing by the community, there was no settlement of it to be made, and the property belonging to it could at once be partitioned among the parties interested.

Art. 2405, C. C. declares:

"At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess are presumed common effects or gains."

And art. 2406:

"The effects which compose the partnership or community of gains are divided into two equal portions between the husband and wife, or between the heirs, at the dissolution of the marriage."

The construction of this last article, although seemingly so plain in its terms, and the nature of the interest of the surviving wife or her heirs in a community dissolved by her death, and the rights of action growing out of it, have been the subject of many and conflicting decisions by the courts of the State, and the jurisprudence on this point is somewhat unsettled.

In the case of German vs. Gay et al. 9 A. 582, the identical question here presented came up for adjudication. The Court in that case says:

"The plaintiff as heir-at-law of Nancy Frier, late wife of R. Nichols, and in community with him, sues the defendant for one half of a slave which belonged to the community. The question presented by the exception is whether the heir of the wife has a right to recover the undivided half without alleging that a partition has been made, and *the community settled.*"

The Court held that the action would lie, and further says:

"It cannot be doubted that the community terminated by the death of one of the parties; if the husband survives, he has no longer a right to sell the whole property. The heirs of the wife may renounce or accept the community; if they accept, either tacitly or expressly, they become joint owners with the surviving husband; and if the husband sells, he can convey no greater right than he has himself, and his vendee becomes the co-proprietor with the heirs of the wife. * * * According to our understanding of the Code, the distinct interest of the parties attaches at the dissolution of the marriage, subject, however, to the right of the wife or her heirs, as the case may be, to renounce, and thereby exonerate herself from the payment of the debts of the com-

munity. * * * * The District Judge is of opinion that a distinct interest does not rest in the wife or her heirs before a settlement or liquidation of the community; but if this were so it would be difficult to reconcile that part of the Code which authorizes the wife, or herself, if she survives, to attach alienations made by the husband, even during marriage, which had been made in fraud of her rights. If her eventual right depended altogether on a settlement to be had of the community, she would be without any right of which she could be defrauded.

"The pretensions of the surviving husband rest upon the supposition that he has in law a right to settle and liquidate the community, and that the rights of the wife depend upon such settlement and liquidation, which must be done with him and him alone. His authority as master of the community ceases on the dissolution of the marriage. The right of the heirs of the deceased party then attaches to have a partition of the effects subject to the payment of the debts."

The opinion in this case, from which we have just quoted, but reasserts the principles enunciated in the case of Broussard vs. Bernard, 7 L. 222, and they have been followed by a long line of decisions which re-affirm the same doctrine. See 12 R. 266; 3 A. 562; 5 A. 581, 582; 16 A. 49; 18 A. 409; 19 A. 428.

In the case of Bennett vs. Fuller, 29 A. 663, the various decisions on this subject were reviewed by our immediate predecessors; and after referring to the conflict in the decisions, and thoroughly discussing the same, they quote from the earlier decisions which we have cited, and expressly sanction and approve the doctrine which they enunciate. We, too, concur in their conclusions.

To give the article of the Code referred to a different construction, or the construction warranted by some of the decisions of this Court, a number of which have been cited by counsel for defendant, would be in a great measure to destroy the force of the article, and almost to deny any right under it whatever to the surviving wife or her heirs; or if any right is recognized, it is so undefined, and its exercise clogged with so many conditions as to render it virtually impracticable.

To set at rest this vexed question, we distinctly announce that, construing the articles of the Code upon this subject in accordance with what we conceive to be their plain and express language, we hold that when the community of acquets and gains is dissolved by the death of the wife, the respective interests of the surviving husband and of the deceased wife attach at the moment of its dissolution to the property of the community, subject to the payment of the community debts. This right will be recognized when demanded in the proper action, and may be enforced at any time when demanded by a partition of the property or otherwise, even when the property is burdened with the usufruct in

favor of the surviving husband, where no opposition is interposed by creditors of the community, or by the administrator of the succession of the deceased wife, demanding security for the community debts.

Nor was it necessary that the petition should have alleged that a settlement had been made of the tutorship, as urged in the first ground of the exception. This entire tutorship proceeding embraced only the interest of the two minor heirs, according to the allegations of the petition, and the plaintiffs were not parties to it, and in no way affected by it.

There is therefore no force in this first ground of the exception. The allegations do show a cause of action.

Second—The suit is not for a partition, but only for the recognition of the right of plaintiffs to an interest in the community property; and therefore it was not necessary to make the co-heirs parties. 3 L. 134; 5 L. 430; 6 L. 232.

Third—The suit is in part for the recovery of property, and thus far is petitory in its character. The defendant interposes a proceeding in the parish court, to which plaintiffs were not parties, as an obstacle to their recovery. The validity of such proceeding might become a legitimate subject for attack and investigation. But, as we have stated above, the adjudication to the defendant of the community land, and the entire tutorship proceeding, could have no material bearing in the case, and could in no manner affect plaintiffs' rights under the allegations of the petition; and therefore need not even have been mentioned in the petition. 11 A. 384; 12 L. 214; 27 A. 625; 28 A. 303.

Fourth—It was not necessary that plaintiffs should have been appointed administrators of their mother's estate to be authorized to sue. According to the allegations of the petition, the community owed no debts, and to have assumed an administration on a succession that owed no debts was unwarranted; and besides, the heirs by accepting a succession purely and simply, even if there be debts, can enforce any right derived from the deceased by an action in their own names; nor need a recognition of their heirship precede such action. 7 R. 183.

Fifth—There is no force whatever in this ground of the exception; it refers to the tutorship proceeding, which we have shown could have no bearing in the case, nor in any way affect plaintiffs' rights under their allegations.

Sixth—From what we have said touching the first ground of the exception, it plainly appears that the District Court had jurisdiction of the suit as relates to the interests in real estate claimed, had the defendant even qualified as the tutor of the plaintiffs.

The rest of the demands embraced in the suit could only have been inferred by requiring the rendition of a tutorship account and the proper

proceedings in connection therewith in the parish court. It, however, appears from the pleadings that the defendant never qualified as the tutor of the plaintiffs; and therefore they had a right to institute this suit against him in the District Court as though he were a stranger or an intermeddler. As the defendant was a resident of Union parish, he was properly cited in the District Court of that parish, and the plea to the jurisdiction *ratione personæ* is alike untenable.

The exception should have been overruled.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be annulled, avoided, and reversed, and that the case be remanded to the court *a qua* to be proceeded with according to law, defendant to pay costs of this appeal and of the lower court from the filing of the exception therein to this date.

No. 962.

STATE OF LOUISIANA VS. SCOTT ROSS.

The verdict of the jury is not illegal and null because written "gulty withoit capitel parnish," when read aloud and distinctly announced by the Clerk as "guilty without capital punishment." Besides, the law does not require, even in cases of capital punishment, that the jury should reduce their verdict to writing.

It is not illegal for the Clerk, instead of the Judge, to propound to the prisoner the question why "sentence of the law should not be passed upon him."

A witness cannot be asked whether the prisoner's pistol was fired off accidentally or on purpose. It is for the jury to draw their conclusion.

The special charge asked for by the prisoner's counsel, that "if there has been any evidence produced on the trial, that the killing of William Henry Anderson by the accused was accidental, then and in that event the jury cannot infer malice from the killing," was illegal and properly refused.

This Court cannot consider any question of fact connected with a Motion for a new trial, even when shown by testimony of witnesses regularly taken in open Court, unless the same is embodied in a Bill of Exceptions to the ruling of the Court below.

APPEAL from the Nineteenth Judicial District Court, parish of Terrebonne. *Goode*, J.

Sey. R. Snaer, District Attorney, and L. F. Suthon for the State, Appellee.

Thomas L. Winder for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was indicted for murder, was tried, convicted, and sentenced to imprisonment at hard labor in the Penitentiary for life. From this sentence he has appealed.

He assigns in this Court errors in the proceedings in the words following:

First—"That the verdict rendered by the jury, to wit, 'gulty withoit capitel purnish,' 'signed H. Routh, foreman,' is illegal, null, and void, not authorized by or known to the laws of the State of Louisiana, and does not justify any judgment save that of discharge without day."

Second—"That it was error in the district judge not asking him, the accused, why the sentence of the law should not be pronounced against him. That the clerk of the court being under the constitution and laws purely a ministerial officer, and not clothed with judicial functions, is not warranted in propounding a question such as this, which is necessary in prosecutions of felony."

1st. The law does not require even in capital cases that the jury should reduce their verdict to writing. It is sufficient if it is delivered orally. In this case it is shown by the record that the verdict was written in the words which we have quoted *verbatim* above. That it was handed to the clerk who was directed to read the same. It was read aloud by the clerk to the jury and the verdict distinctly announced as "guilty without capital punishment," and the judge ordered it to be filed and recorded. The jury was then polled on motion of defendant's counsel, and upon the name of each juror being called and asked by the clerk if this was his verdict, each one answered that it was. Even if the writing left in doubt what the verdict of the jury was, which is not very probable, the proceedings connected with the delivery of the verdict, which we have detailed, would certainly remove that doubt, and render it conclusive that the verdict was in accordance with and fully supported the sentence.

2d. Respectable authorities support the position that it is not absolutely essential to the legality of the proceedings that the question embraced in the second ground of error, above referred to, should be propounded to the accused either by the judge or the clerk; and that its entire omission would not be fatal to the sentence.

28 Georgia, 576; 27 Mo. 324.

As to the effect of such entire omission, we are not called upon in this case to decide. The prisoner in this case was asked by the *clerk* "if he had any thing to say why sentence should not be passed upon him in accordance with law."

Bishop in his work on Criminal Procedure declares that this question is properly propounded by the clerk, and we believe this to be the ancient rule on the subject, just as he asks the prisoner on arraignment whether he is guilty or not guilty.

Bishop on Criminal Procedure, 1 v. 118.

3d. The counsel for the accused further urges, that upon the trial of the case a witness for the State was asked upon his cross-examination the following question:

"Was the discharge of Scott Ross's pistol accidental, or did he fire off the same on purpose?"

That objection was made to this question, and sustained upon the ground urged by the counsel for the State, that it called for the opinion of the witness.

We think the ruling correct. It was the province of the jury to draw the deduction from the facts and circumstances connected with the shooting, as shown by the evidence, whether the shooting was accidental or not, which seems to have been the main, if not the sole, issue in the case upon which the defense relied. To enable the jury to come to a correct conclusion on this point, it was proper that every fact, incident, and circumstance connected therewith should have been proved; but it was not competent to assist them in their conclusion by showing what the witness thought on the subject before them in their conclusion on this point. The question was clearly objectionable. 1 Greenleaf, 440; 7 R. 451; 13 A. 45; 21 A. 726; 27 A. 316, 392.

4th. Another alleged error complained of was the refusal of the judge to give this special charge asked for, viz.:

"If there has been any evidence produced on the trial that the killing of William Henry Anderson by the accused was accidental, then and in that event the jury cannot infer malice from the killing."

The court properly refused to give this charge. The accused was indicted for murder. An essential ingredient in that crime is malice. To charge as asked for would have been virtually to instruct the jury to believe any evidence produced on the trial that would show that the killing was accidental, and acquit the prisoner of murder, since without malice there could be no murder.

Besides, this evidence, if there was any such, might have been evidence, in the estimation of the jury, unworthy of credit, and the charge asked for was calculated to deny or restrict their clear right to judge of the credibility of evidence before them, and to accept or reject it as it might or might not commend itself to their confidence and belief.

The jury are the sole judges of the facts in criminal trials. It is their right and duty to consider all the facts before them having any bearing on the guilt or innocence of the accused. The charge in question would have drawn them from this broad field of investigation, and narrowed their inquiries to a single point. The charge asked for was clearly objectionable.

5th. A motion for a new trial was made, and refused by the lower court. The only complaint made here connected with this ruling is that

General Lyons, one of the jurors who tried the case, was incompetent, for the alleged reason that he had before the trial formed and expressed an opinion in relation to the guilt or innocence of the accused; but had sworn when examined on his *voir dire* that he had formed no such opinion.

Whether or not the alleged fact was established in the court below to the satisfaction of the judge, the record is silent. The only evidence we have of it is an *ex parte* affidavit of one Harry Hays Cage, made before a notary public, which appears in the record. Such evidence was inadmissible, even in the court *a qua*, to establish any fact. It is of course far less satisfactory than evidence taken contradictorily between the parties in open court. Yet to such an extent does the constitutional inhibition on the powers of this Court to take cognizance of questions of fact in criminal cases go, that we have recently held, in case of the State vs. Nelson, that this Court cannot consider any question of fact connected with a motion for a new trial, even when shown by testimony of witnesses regularly taken in open Court, unless the same is embodied in a bill of exception to the ruling of the Court.

The counsel for the accused refers us to the case of the State vs. Gunter, 30 An. 536, in which Judge Egan, as the organ of the Court, intimates that the Court might take cognizance of a fact connected with any incidental matter in a criminal case if brought to their attention by an affidavit. This was clearly an *obiter*, and we do not regard it as law.

We see no error in the proceedings to entitle the accused to relief.

The judgment of the lower court is therefore affirmed.

No. 988.

J. B. RUTLAND, TUTOR AND ADMINISTRATOR, vs. R. G. COBB.

Value and settlement of Counsel fees.

APPEAL from the Fifth Judicial District Court, parish of Ouachita. *Richardson*, J.

Boatner & Liddell, for Plaintiff and Appellee, cited:

4 An. 578; 11 An. 637; 3 An. 90; 2 Rob. 404; 3 An. 518; 21 An. 689; 27 An. 467.

Cobb & Gunby, for Defendant and Appellant, cited:

31 An. 130; 30 An. 363.

The opinion of the Court was delivered by

LEVY, J. Plaintiff brings this suit to recover from defendant the

sum of three thousand two hundred and thirty-four dollars and seventy-six cents, alleged to have been collected by defendant, in his capacity as attorney, and to belong to the estate of John J. Hasby and his minor and other heirs, and which sum has not been paid over by defendant. The answer alleges that the suit was maliciously brought for the purpose of defaming and injuring defendant in his business as an attorney-at-law; that defendant has rendered important services to plaintiffs, which were well worth four thousand dollars; and he pleads in reconvention the difference between the amount he is sued for and the amount he claims as a fee.

The defendant is an attorney-at-law; he was consulted with and engaged by plaintiff to represent the minor heirs and the major heir, J. J. Hasby, since deceased, and represented by Rutland as administrator, in all matters necessary to establish their legal rights and obtain their respective shares in the succession of David Hasby, deceased. Thus, acting as the attorney of plaintiff, defendant collected a certain note belonging to the administrator, in his said capacity, amounting to six thousand four hundred and sixty-nine 62-100 dollars. Of this amount he paid to the administrator $3234 76, and retained in his hands the balance of $3234 86, the whole of which balance is claimed by plaintiffs in this suit, without giving the defendant any credit whatever.

Defendant in his answer claims $4000 as being due to him as fees for his professional services rendered to plaintiffs, and asks for judgment in his favor for the difference ($765 14) between the amount ($3234 86) retained by him, and the amount claimed as due him for fees ($4000.) There was judgment in the lower court in favor of the plaintiffs for the sum of $3234 86, and sustaining the reconventional demand of defendant to the extent of $3000. This judgment in favor of plaintiffs to be compensated by that in favor of defendant for $3000, *pro tanto*, and the balance in favor of plaintiff, viz.: $234 86, to bear interest at five per cent from the 12th of April, 1878. Defendant has appealed from the judgment of the court *a qua*.

Plaintiff has filed a motion in this Court asking that the judgment of the lower court be amended so as to give him judgment against the defendant for the sum of $1234, instead of the amount allowed by the decree appealed from. This is a practical admission or fixing of defendant's fees at $2000.

We have carefully reviewed the evidence on the subject of the value of the professional services of the defendant, and the record showing the extent and variety of those services, and the professional labor incident to them. This satisfies us that the services of the attorney were ably, faithfully, zealously, and laboriously rendered, and inured greatly to the benefit of the plaintiffs. We find nothing to convince us

that there was any stipulation as to the fee to be received, and we can well understand how the defendant, believing himself entitled to the remuneration which he claims, retained the balance of $3234 86 to be imputed thereto.

In view, however, of the amount involved and ultimately realized by the plaintiffs, and to some extent appreciating the fee proportionately to the amount recovered or received by plaintiffs, we regard the amount allowed by the lower court as substantially fair and just to all parties, and are unwilling to disturb the judgment.

The judgment of the lower court is affirmed with costs.